IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-1631
[2016] NZHC 1678

BETWEEN	AUGUSTINE LAU Plaintiff
AND	HANMO LI Defendant

Hearing: 20 July 2016

Appearances: Mr Lau - Plaintiff in person
Mr G Blanchard for Defendant

Judgment: 25 July 2016

JUDGMENT OF ASSOCIATE JUDGE J P DOOGUE

This judgment was delivered by me on
***25.07.16 at 3.30 p.m.**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……..

[1] On or about 20 August 2013 a company called Euro Asia Building Construction Limited ("Euro Asia") entered into a written agreement with the defendant. The agreement was a homemade agreement, apparently drafted by Mr Lau, the plaintiff. The contract is described on its face as "New building construction and land subdivision agreement".

[2] The agreement was concerned with the subdivision of residential housing land at 41 Alverston Street, Waterview, in Auckland. The "project process" was described in the following terms:

> **Project Process**
>
> 1. Subdivision application
> 2. House design and document preparation
> 3. Apply for consent (subdivision consent and building consent)
> 4. Consent issue
> 5. Subdivision construction
> 6. Building construction
> 7. 224c application
> 8. Separate title and Code Compliance Certification Application
> 9. Title issue and CCC issue and Project completion.

[3] There then followed pages which set out in more detail what was to be involved at each stage that the contract contemplated. There was therefore a "land subdivision part" and a "building construction part".

[4] The land subdivision part was itself broken down into several stages which appear to be the following:

a) There was a first stage "subdivision consent" process and;

b) A second stage "subdivision construction part" and;

c) A third stage certification of the subdivision including the obtaining of a local authority certificate which would enable the subdivision to go ahead.

[5] The building construction part of the contract was itself also broken down into stages. There were three stages identified as the building consent lodgement, building consent issue and building construction.

[6] One of the key issues was the question of the cost. It is of key importance to the claim which the plaintiff has brought which is that he is entitled to judgment for two separate amounts, one for $7,006.07 and the other which is described as:

> (B) The profit of 20 percent of Building construction cost in the agreement dated 20.8.2015 of $717,000.

[7] The defendant has filed an application for summary judgment against the plaintiff. There are two key points, the first is that no claim is available under the contract because it was not enforceable on the grounds of lack of certainty. Secondly, the contract was entered into by Euro Asia and not Mr Lau. Mr Lau has brought his case in reliance upon an alleged assignment of the contract dated 18 June 2015 but the defendant contends that such an assignment is champertous and invalid. Even if there was a claim available to Euro Asia, which the defendant denies, it has not been validly assigned to Mr Lau who has no standing to sue on it. The actual grounds put forward by the defendant in support of the summary judgment application are in the following terms:

> (a) The plaintiff's statement of claim discloses no cause of action that can succeed because:
>
> (i) The contract under which the plaintiff sues the defendant was between … Euro Asia (sic);
>
> (ii) The defendant has no liability to Euro Asia under the contract;
>
> (iii) The alleged assignment of the contract from Euro Asia to the plaintiff on which the plaintiff's claim was based is void for reasons of public policy.
>
> [these grounds are the grounds for both the summary judgment application and the strike out application.]

[8] I will examine first the contention that the defendant had no liability to Euro Asia under the contract.

Principles

[9] Before examining the contentions of each side with regard to the dispute, brief mention is required of the principles which govern the defendant's application for striking out orders or for summary judgment.

[10] I accept that the principles are correctly stated in the submission that Mr Blanchard made on behalf of the defendant. I agree that it is established that the following is the correct approach to take to both types of application.

[11] The power to grant summary judgment in favour of a defendant is found in r 12.1(2) of the High Court Rules.

[12] The principles relating to summary judgment applications by defendants are well settled:[1]

i) The defendant bears the onus of satisfying the Court that none of the claims can succeed.

ii) It is not necessary for a plaintiff to put up evidence, although if the defendant supplies evidence that would satisfy the Court that the claim cannot succeed, a plaintiff will usually have to respond with credible evidence of its own.

iii) At the end of the day, the Court must be satisfied that none of the claims can succeed. It is not enough that they are shown to have weaknesses, and the assessment made is not one to be arrived at on a fine balance of the available evidence as may be appropriate at trial.

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1 *Westpac Banking Corp v M M Kembla New Zealand Ltd* [2001] 2 NZLR 298, (2000) 14 PRNZ 631 (CA).

iv) Summary judgment will not be appropriate where it is possible for the plaintiff to amend its claim so as to remedy the defects relied on by the plaintiff.

[13] Rule 15.1 of the High Court Rules provides for the power to strike out all or part of a proceeding.

[14] The applicable principles are also well settled:[2]

i) Pleaded facts, whether or not admitted, are assumed to be true. This does not extend to pleaded allegations which are entirely speculative and without foundation.

ii) The cause of action or defence must be clearly untenable. The Court must be certain that the claim cannot succeed.

iii) The jurisdiction is to be exercised sparingly. Courts are reluctant to terminate claims or defences short of trial.

iv) The jurisdiction is not excluded by the need to decide difficult questions of law requiring extensive argument.

v) The Court should be particularly slow to strike out a claim in any developing area of the law.

Liability under the contract

[15] In order to further consider the basis of the application which the defendant brings, it is necessary to undertake further analysis of the contractual arrangement that was entered into.

[16] The key question that the defendant raises is one of certainty of the terms of the contract. In this case the issue of uncertainty that the defendant says arises, has to do, not with the obligations that the plaintiff was required to undertake as part of

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2 *AG v Prince* [1998] 1 NZLR 262, (1997) 16 FRNZ 258, [1998] NZFLR 145 (CA) at 264, endorsed by the Supreme Court in *Couch v AG* [2008] NZSC 45 at [33].

the contract, but rather with what price the defendant was bound to pay for the services of Euro Asia under the contract.

[17] The first two stages of the contract which are the first parts of the land subdivision phase, specify amounts which the plaintiff was required to pay for the services there described. First, the plaintiff was to pay:

> $7,475 ($6,500 plus GST) has already been paid.

[18] This amount was referable to taking steps such as searching the title of the property for sub divisional purposes.

[19] That was followed by the second part which was concerned with "consent lodgement preparation". The amount required to be paid under this part of the contract was described in the following terms:

> $10,350 ($9,000 plus GST) has already been paid.

[20] There were other stages identified which would follow these steps. For example what was described as the "third part" involved obtaining subdivision consent issue. There then followed this statement:

> The total cost for the first stage will be up to $30,000 and it will take about 2-3 months.

[21] I interpolate that the contract therefore partly fixed the price of the various stages that would be taken up in the land subdivision part of the contract, but those specific sums that were identified, were not going to be the totality of the price. There was additional cost envisaged which would bring the total "up to $30,000".

[22] Although there were amounts fixed for parts of the first stage, the subdivision, there were other parts of the contractual pricing which were at large with an estimate being given of between $130,000 to $150,000 as I have noted.

[23] The description of the land subdivision part of the contract continued with specific attention being given to the "subdivision construction". In this part there

was no attempt to identify exact sums that would be payable. The following statement appears in the contract which describes the cost:

> Second stage is mainly the sub-division part. It will be cost about between $70,000 - $100,000.

[24] The final part of the sub-division part of the contract which was concerned with obtaining local authority certification for the sub-division and obtaining titles was described in these terms:

> The whole part will take about two months. It will cost about $20,000.

[25] As part of the building construction portion of the contract the parties agreed:

> This part is mostly to find good architect to design the house, the design must meet the owner's satisfaction before its lodgement

[26] There then appeared at the very end of the description of the services and obligations in the contract for the land subdivision part, the following statement:

> So total subdivision cost will be between $130,000 to $150,000. It will about four months (sic).

[27] The second part of the contract, the building construction part, was similarly non-specific about all of the costs that would be involved. There was a stage identified as:

> First stage – building consent lodgement.

[28] This was described in the following terms:

> Normally take about 6-8 weeks. Cost will take about $30,000 including design fee, building consent lodgement fee and engineering fee altogether.

[29] That description of the contractors obligations was followed by the second stage which was:

> Building consent issue.

[30] The description of the parties obligations under this part was as follows:

> This part is the collection of the building construction quotation and pre-construction meeting. And order the material. Make formal building construction agreement with owner. It will take about four weeks.

[31] So while the stage just referred to is headed "Building consent issue" the description of the activities which follow were not concerned with that but about getting quotes for construction in ordering material and organising a formal building construction agreement.

[32] The third and final stage of the building construction part of the contract was in the following terms:

> Following the building consent to start the building construction, it will take about eight months. Cost is about $687,700 for building new houses (GST inclusive), it is base on the standard 230 sq metre building area at a $13,000 plus GST per sq metre rate. The cost may vary depends on the house area and the materials that will be used, formal building construction contract must be signed before the construction and all the details will be listed on the contract.

[33] The intent of this particular part of the contract was that the parties would not be bound until they had signed a formal contract that contract was to contain "all the details" of the proposed construction. This, I consider, was intended to include the design of the property, specifications and definitions of the materials and fittings that were to be used.

[34] The final matter that bore upon the question of costs was the concluding comment at the end of the contract:

> All the above cost are only estimate and it will be re-calculated once consent issue and discussed between the two parties.

Discussion

[35] The requirement for certainty as to the terms which the parties had agreed upon was described in the text *Law of Contract in New Zealand:*[3]

> 3.7 The requirement of certainty

[3] Burrows, Finn and Todd, *Law of Contract in New Zealand* (5ed 2016) at 85.

> The courts have long insisted that any agreement which is to have contractual force must be in terms which define with a sufficient degree of certainty the obligations which the parties are to undertake. The law was summarised thus in *Wellington City Council v Body Corporate 51702 (Wellington)*:
>
> The essence of the common law theory of contract is consensus. It follows that for there to be an enforceable contract, the parties must have reached consensus on all essential terms; or at least upon objective means of sufficient certainty by which those terms may be determined. Those objective means may be expressly agreed or they may be implicit in what has been expressly agreed. Taking price as an example, for a contract to be enforceable the parties must have agreed upon the price, or at least they must have agreed upon objective means of sufficient certainty whereby the price can be determined by someone else, or by the Court. If the price is left for later subjective agreement between the parties, the contact is not enforceable.

[36] The question therefore is whether the parties had identified the minimum basic elements of the contract which would give rise to an enforceable obligation. The position which the applicant took was that such matters as were agreed, were not sufficient to reach the standard required.

[37] Mr Blanchard essentially submitted that while the parties apparently intended to settle some form of agreement, a fact to be inferred from their describing the document they signed as an "agreement", they did not in fact agree on the core elements upon which agreement was required in order for there to be a binding and enforceable contract. Important aspects of the agreement, he submitted, were stated as subject to future agreement. He instanced the fact that the defendant was yet to obtain from an architect, design of the properties that she wanted to have built, nor had she settled upon the standard of materials and fittings which were to be used in construction. Logically linked to this point was the fact that the parties were not able therefore to agree on a price.

[38] Mr Lau, on the other hand, made two main submissions. First he stated that the defendant had visited show homes which the plaintiff had constructed and that as a result, she had been able to observe a form of design and a standard of finishing which would in effect apply it in default of any further agreement. Secondly, he pointed out that the pricing figure which was provided in the contract assumes a minimum of 230 m^2. As I understand his submission, if this figure was exceeded, the defendant would not be able to erect two houses on the area of land available.

While he did not spell it out in those terms, he again apparently intended to submit that in the absence of agreement to the contrary, the 230 m² figure ought to be adopted as what the parties had agreed upon.

Conclusions

[39] The intention of the parties in my view was to provide firm prices for parts of the work that were to be done in order for the subdivision to be carried out. The provision of fixed figures for the first stage which involved the land subdivision part of the agreement are consistent with such an approach. However beyond that stage, the parties were not able to reach any agreement. The estimated maximum cost of construction depended upon the size of the house and the materials that were to be used. Those matters were never settled and accordingly no agreement was ever reached about the price. The argument that Mr Lau puts forward to the effect that default standards were set as to the design and fit-out of the houses by conflating what was going to be required in the contract, with what appeared in the open home houses, is not valid. The defendant never agreed to such an approach. She may have wanted something quite different from what was in the open home. Had she been given a choice of proceeding with a house modelled on the open home or not proceeding at all, she may well have taken the latter option. We just do not know what the outcome might have been.

[40] Further, the argument about the maximum areas for each house does not assist the plaintiff either. It may have been that the defendant decided that if she was to have houses built that met her requirements, she would have to trade off the house size in order for a higher standard of construction to be adopted.

[41] The fact that the parties obviously understood that they had not reached the point where there was a complete agreement to which they were bound was explicitly recognised by the insertion in the agreement of a provision that, a formal construction contract was to be signed before construction would take place. That formal contract would include, the agreement made it clear, the missing detail about design area and standard of construction.

[42] In my assessment the plaintiff's claim cannot succeed.

[43] My conclusion is that the parties had not reached a complete agreement. The key elements, namely the extent of the obligations which the builder would be incurring by entering into the arrangement on the one hand, and the price that the purchaser would have to pay on the other, had not been finalised. The buyer still had to obtain from her architect the plans and specifications for the houses that she wished to build. The size of those houses and the standard of materials, the specifications for landscaping and other matters had not been agreed upon.

[44] It is correct that the builder had stated in the document what the basic component of the building costs would be, namely the approximate square metre price of $1700 plus GST. But that did not tell the buyer what her ultimate obligation was going to be in money terms. She did not know the price, in other words. It is difficult to imagine a less central aspect of an alleged contract that the parties would have to agree upon. All that she had was what was stated to be an estimate of the price. Objectively considered, it cannot be supposed that the parties were intending to enter into a binding contract.

[45] The plaintiff argued that given the available space for building that would result from the completion of the subdivision, the court could come to some conclusions about what the likely size of the houses to be built on the properties were. That is in essence an argument that it could be supposed that the defendant was virtually certain to build up to the maximum size which was permitted as a result of the land area available. I do not accept those contentions. Questions of the cost per square metre could well affect the overall commitment in money terms that the defendant wished to enter into. Ultimately it may have been found that she was reluctant to compromise on a higher standard of specification and fitting that she wanted and that therefore there had to be a concession made with the area of the dwellings to be built.

[46] The claim for the loss of profits cannot therefore succeed. The consequences of that conclusion are dealt with further on in this judgment.

[47] If relief is to be granted it ought to be in the form of a judgment entered on the application for summary judgment which the defendant has filed. Before coming

to a final conclusion on that point it will be necessary to consider a cause of action based upon the alleged non-payment by the defendant of a debt that it owes to the plaintiff arising out of work that was actually undertaken to obtain subdivision consent. It is that matter that I deal with next.

The $7000 debt

[48] There is evidence – albeit not very clear evidence – that the defendant incurred debt with the plaintiff which, after making allowance for a pre-payment of $15,000, came to $7006.07. The defendant sent an email to the plaintiff in which she acknowledged being liable for that sum. It has not been paid.

[49] There is no reason why the defendant could not be found liable to pay this amount. It is not just a case of the defendant having admitted liability – or at least arguably having done so. The contract between the parties could be interpreted as involving several portions or segments to some of which a specific price was allocated. The interpretation that the plaintiff is able to contend for in this circumstance, is that while liability of the defendant with regard to the other obligations contained in the contract might be controversial or even doubtful, he is entitled to claim separately for the sums that were identified as being the consideration that would be paid once he had provided the specific services identified in the first part of the contract which was concerned with subdivision consent.

[50] If that is so, then the further conclusion must be available that, subject to certain matters yet to be mentioned, the plaintiff is able to resist the entry of summary judgment on the basis that the non-payment of the $7006.07. Because it is arguable that the defendant cannot succeed in regard to that part of the claim which the plaintiff brings, summary judgment must fail entirely.

[51] That is to say, the defendant has not satisfied the requirements of HCR 12(2)(2).

The Assignment Issue

[52] The deed of assignment purports to assign from Euro Asia to Mr Lau the $7,000 debt to which reference has already been made together with "say 20 percent profit of the home construction …".

[53] There is no recitation in the background or the evidence which might explain why the company would assign such rights to the plaintiff. The deed acknowledges (in a preamble) that Mr Lau "act as attorney of Euro Asia Building Construction Limited and manage the company". Further the deed recites:

> B Due to the financial difficulty of the company, Euro Asia Building Construction Limited willing to assign all its profit and outstanding (potential) debt owed from the third party to assignee.

[54] No consideration is stated for the assignment. Nor is it explained either in the preamble or elsewhere as to why the company would, assuming that it was in financial difficulty, sign one of its assets to the plaintiff.

[55] While these matters are unexplained and unsatisfactory and raise question marks about the bona fides of the transaction, the defendant attacked the assignment on different grounds.

[56] Mr Blanchard submitted:

> 28. It is important to be clear from the outset that while the deed purports to be an assignment of the Agreement, it was in fact an assignment of a bare cause of action. The timing of the assignment is crucial here. The assignment took place at a time when there was no question of the Agreement being performed. Ms Li's solicitors' letter of 14 March 2015 made it clear that she did not consider herself to be bound to use Euro Asia's services to carry out the construction of the two houses She had made alternative arrangements for the work to be carried out and her intention was to have nothing more to do with Euro Asia. Neither Euro Asia nor its solicitors ever responded to this letter. Thus, whether or not Euro Asia accepted Ms Li's position that she was not required to use the company's services, it is clear that neither party expected that Euro Asia would be performing any further work under the Agreement. The only outstanding matter concerned whether Ms Li was liable to Euro Asia in damages for repudiation of the Agreement. Thus, when Mr Lau subsequently on 18 June 2015 purported to take an

> assignment of the Agreement, what he was taking an assignment of was in substance a bare claim for damages.

[57] By the time the assignment occurred which was in 2015, it was clear that on 3 March 2015 the defendant had engaged another separate company to carry out the construction work.[4] Therefore the assignment which took place some three months later, can only be seen as the assignment of the bare cause of action as the defendant contends, that being so. I further accept the submission which Mr Blanchard made:

> 29. In order to constitute a valid assignment of a claim, Mr Lau needs to show that he has a "genuine commercial interest" in the claim apart from a mere interest in profiting from the outcome of the proceedings. He has failed to do so.

[58] Mr Blanchard also referred me to *Waterhouse v Contractors Bonding Ltd* in which the court said:[5]

> Assignments of bare causes of action in tort and other personal actions are, with certain exceptions, not permitted in New Zealand. The rule had its origins in the torts of maintenance and champerty but now seems to have an independent existence of its own. This leads to the conclusion that, if a funding arrangement amounts to an assignment of a cause of action to a third party in circumstances where this is not permissible, then this would be an abuse of process.

[59] Counsel for the defendant also referred to:[6]

> … the House of Lords decision of *Trendtex Trading Corporation v Credit Suisse*.[7] That decision established the principle that the validity of an assignment depends on whether the assignee had "a genuine commercial interest in taking the assignment and in enforcing it for his own benefit."

[60] Examples which are provided in the *Trendtex* case of where there is a commercial interest sufficient to support a bare assignment of a cause of action include assignment by an insured person to his insurance company pursuant to the latter's rights of subrogation.

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4 Exhibit B to affidavit of defendant sworn 23 March 2016.

5 *Waterhouse v Contractors Bonding Ltd* [2014] 1 NZLR 91 (SC) at [57] and 76(e)].

6 *See also Body Corporate 160361 v BC 2004 Ltd* [2014] NZHC 1514; *Auckland City Council as Assignee of Body Corporate 16113 v Auckland Council* [2008] 1 NZLR 838 (HC); and *Simpson v Norfolk and Norwich University Hospital NHS Trust* [2011] EWCA Civ 1149, [2012] QB 640.

7 *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 (HL).

[61] Mr Lau said that in this case he was the assignee and had managed the company, that is Euro Asia. He also relies upon the fact that he is described in the assignment deed as being the attorney of the company. In my view neither of these factors amounts to a sufficient interest to support an assignment. The fact that Mr Lau may have been employed by the company, assuming that is true, is neither here nor there. It does not amount to a recognisable commercial explanation for why the debts should be assigned to him. Further, his purported status of attorney for the company does not progress matters either. The function of the attorney is simply to give effect to the wishes of the company. The fact that Mr Lau occupied that position does not explain why he was receiving the company's property by way of an assignment.

Discussion

[62] It is apparent that so far as the cause of action based upon the claim for loss of profits under the contract, the purported assignment is invalid. Mr Lau has not identified any property interest which might justify him acquiring the right of action against the defendant for breach of contract. In my judgement, the purported assignment of the rights of action in regard to that part of the claim is unenforceable because it is champertous.

[63] The position concerning the debt is not so straightforward. If it is arguable that completion of the subdivision consents gave rise to a debt of $7006, then it will be necessary to consider whether the same outcome applies with regard to the purported assignment of the debt as it was reached in regard to the claim for damages.

[64] The authorities recognise that the assignment of the debt is specifically recognised by the law as not being caught by the doctrines of maintenance and champerty.

[65] In *Camdex International Ld v Bank of Zambia*[8] the United Kingdom Court of Appeal considered earlier authorities including *Fitzroy v Cave*.[9] Lord Justice

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8 *Camdex International Ld v Bank of Zambia* [1996] 3 ALL ER 431.

9 *Fitzroy v Cave* [1905] 2 KB 364.

Hobhousein *Camdex* made the following comment on the judgment of Cozens Hardy LJ in *Fitzroy v Cave*:[10]

> He went on to refer to the many instances in which the assignment of debts had been recognised as effective in equity and how such acceptance was fundamental to a number of recognised classes of transaction, including the assignment of debts to trustees. He continued ([1905] 2 KB 364 at 373-374, [1904-7] All ER Rep 194 at 199):
>
> > It has never, so far as I am aware, been suggested that a trustee to whom a debt is assigned is exposed to a charge of maintenance. Mortgages are every day dealt with in this fashion, including an assignment of the debt. From time to time particular classes of obligation have by statute been rendered assignable at law, and by the Judicature Act, 1873, s. 25(6), any debt is made assignable at law by an absolute assignment in writing, of which notice is given to the debtor. Henceforth in all courts a debt must be regarded as a piece of property capable of legal assignment in the same sense as a bale of goods. And on principle I think it is not possible to deny the right of the owner of any property capable of legal assignment to vest that property as a trustee for himself, and thereby to confer upon such trustee a right of indemnity. It is not easy to see how the doctrine of maintenance can be applied to a case like the present. The decision of this court in *Comfort* v. *Betts* ([1891] 1 QB 737) really proceeds upon this footing, and seems to me to be decisive of the present case. The court is not asked to exercise any discretionary jurisdiction. If the assignment is valid at all, it is valid in all courts, and the plaintiff is entitled to judgment ex debito justitiae. The plaintiff is merely seeking by this action to recover payment of debts admitted to be justly due ... I fail to see that we have anything to do with the motives which actuate the plaintiff, who is simply asserting a legal right consequential upon the possession of property which has been validly assigned to him. If the defendant pays, no bankruptcy proceedings will follow. If he does not pay, bankruptcy is a possible result. In my opinion this appeal must be allowed.

These decisions of the Court of Appeal are clear. Debts are a species of property recognised before 1873 in equity and, since that date, both in law and equity. Like other species of property, they may be transferred to another and the legal rights which are incidents of that property may be exercised by the new owner of the property. (Indeed, normally, the legal owner will be the only person entitled to exercise those legal rights.) In *Ellis v Torrington* [1920] 1 KB 399 at 411, [1918-19] All ER Rep 1132 at 1138 Scrutton LJ succinctly summarised the position:

> [The courts] treated debts as property, and the necessity of an action at law to reduce the property into possession they regarded merely as an incident which followed on the assignment of the property.

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[10] *Camdex International Ltd v Bank of Zambia,* above 9, at 439.

> From these authorities, which are binding upon this court and subsequent to which the provisions of the 1873 Act have been re-enacted in the 1925 Act, it is clearly established that debts are assignable in law as well as in equity, and the fact that the assignee will have to sue for the debt raises no question of maintenance or other infringement of any principle of public policy. Similarly, it does not raise a question of maintenance or public policy that the terms of the assignment.

[66] I conclude that the purported assignment of the debt for $7006 is arguably valid and that the defendant has not discharged the onus on it to establish that there is no reasonable defence to her application for summary judgment against the plaintiff.

Conclusions

[67] The defendant has brought both an application for strike out orders and for summary judgment. I conclude that neither form of relief is available to the defendant in regard to the debt for $7006. Because of that conclusion, the further result must be that the summary judgment application fails because it does not satisfy the requirements of HCR 12(2)(2). However, the claim of the plaintiff that he is an assignee of the cause of action which Euro Asia would have had for recovery of loss of profits resulting from a breach of contract, is not one which can succeed and therefore should be struck out.[11]

Costs

[68] Costs ought to follow the event in this case. The plaintiff has achieved substantial success and the main part of the claim, that for damages for breach of contract, has been struck out. Mr Blanchard submitted that there ought to be an order for payment of costs on an indemnity basis or for an uplift pursuant to HCR 14.6 (4)(a) or 16.6 (3)(b).

[69] The case that Mr Lau brought was palpably unsatisfactory because it was, badly thought out and poorly pleaded. There are also unsatisfactory features about the entire purported assignment arrangement which give rise to doubts about the legitimacy of what Mr Lau was seeking to achieve.

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[11] *Couch v Attorney General* [2008] NZSC 45 at [33] per Elias CJ and Anderson J.

[70] It is far from unusual that litigants in person like Mr Lau are found to be ill-equipped for the task of bringing proceedings. But, considerations of access to Justice mean that the court has to be realistic about how competently a self represented plaintiff will be able to put forward its case. To penalise self represented litigants too readily will tend to reduce access to the courts. I recognise, though, that a balance has to be drawn between protecting the right of the litigant such as Mr Lau, on the one hand, and the opposite parties who are exposed to the claims and the costs that are unnecessarily incurred through responding to meritless cases.

[71] Overall, though, I do not consider that there are present in this case features which would justify the Court in adding an uplift to the costs that Mr Lau will be required to pay.

[72] There will therefore be an order that the plaintiff pay costs on a 2B basis together with disbursements as fixed by the Registrar.

[73] The final matter that I mention is the proposal put forward by the defendant that the court ought to transfer the remnants of the proceeding to the Disputes Tribunal. I am not clear that there is authority to make such an order. It is however open to the court to transfer the proceeding to the District Court, given that all matters in issue are well under the jurisdictional level of the High Court. I consider that such an order is appropriate and I direct under s 46 of the District Court Act 1947 that the proceeding is to be transferred to the District Court at Auckland.

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J.P. Doogue
Associate Judge