IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

Plaint No. 20/02

BETWEEN **Maui Pearls Limited**
Of Rarotonga Incorporated Company
Plaintiff

AND **Michael Baker**
Of Rarotonga Jeweler
First Defendant

AND **Michael W Baker & Co Goldsmith Limited**
Of Rarotonga Incorporated Company
Second Defendant

Ms C McCarthy for Plaintiff
Mr T Arnold for Defendants
Date of hearing: 20 and 21 May 2004
Date of decision: 31 August 2004

DECISION OF GREIG CJ

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[1] The Plaintiff carries on a business as a jeweler and retailer in Rarotonga and elsewhere. The 1st defendant carried on business as a manufacturing jeweler in Auckland through a registered company Michaels Fine Jewellery Co Retail Limited (the NZ Company). The 2nd Defendant was incorporated in Rarotonga by the 1st defendant.

[2] The Plaintiff and the 1st Defendant had dealings with each other in which the Defendant through the Company manufactured and sold jewellery. Following discussion the 1st defendant agreed to come to Rarotonga and carry on business manufacturing jewellery in association with the Plaintiff. The arrangement was terminated. The Plaintiff claims there was a breach of a written contract. An interim injunction was granted and has since been terminated by effluxion of time. The Plaintiff has maintained its claim of breach and this hearing was the substantive hearing of the claim for damages.

[3] It is common ground that the parties signed a written contract in April 2001. But the parties are in dispute as to the terms of that contract as each alleges that the contract was varied orally. It is convenient to consider the terms of the written contract first.

[4] The document bears the date 17 April 2001. It is executed and signed by the Plaintiff and the 1st Defendant. It is headed "Employment Contract" and recites that the desire to employ the 1st defendant and his agreement to provide services to the Plaintiff described as Employer. Clause 2 which is headed "term" states:

"2.1 The Employer shall employ Michael to carry out or provide and perform the duties, obligations, services and work set out below initially for a three months calendar period ("Probation Period")"

Clause 2.2 provided extension for a further 9 months.

Clause 3 set out the duties functions responsibilities and obligations of the 1st Defendant including the duty to "diligently and faithfully serve the Employer as directed" and to "comply with the lawful instructions and directions of the Employer"

Clause 4 which was the only term as to remuneration or payment states:

"4.1 In consideration of his services Michael shall be entitled to the following benefits:
(a) A one time payment of NZ $4500.00at the commencement of his contract.

If during the Probation Period either party is not satisfied with the terms of employment as contained herein and upon two weeks written notice from one party to the other that this contract shall be terminated at the expiration of such two week period the contract shall herein be terminated and the payment of NZ$4500.00 (referred to in clause 4.1) shall be fully refundable and repaid to the Employer"

Clause 5 required the 1st Defendant to provide all tools and equipment required. Clause 6 required him to faithfully and diligently perform his duties and not to commit or engage in conduct which might cause damage to the Plaintiff. Clause 7 set out terms as to confidentiality of information, return of all things coming into his possession during the term of the contract. Clause 8 dealt with non-disclosure and clause 9 with ownership of work product. Non-competition was provided in clause 10 and this was the foundation of the interim injunction.

The contract contemplated renewal by agreement. Assignment was forbidden without consent and any variation of its terms was required to be in writing.

[5] It is the Plaintiff's claim that contrary to the terms of the contract the sum of $45000.00 was a loan and not remuneration. In fact remuneration was to be and was in fact made on a piece work basis invoiced by the 1st Defendant in the name of the N Z Company and then after the incorporation of the 2nd Defendant in its name. No PAYE tax was paid in respect of the employment or services of the 1st Defendant and that was in or by arrangement with the DIB officers. Although no provision was made in the contract for the cost of the 1st Defendants travel to Rarotonga the Plaintiff claims that the payment of $9717, an agreed amount, was to be refunded by the 1st Defendant. It is also the claim of the Plaintiff that there was an oral agreement for the 1st Defendant to undertake work for 3rd parties on the term that the profit be shared and that the 1st Defendant be entitled to undertake work outside Cook Islands. It is further claimed that by oral agreement the terms of the written contract were extended to the 2nd Defendant and perhaps the NZ Company. The Defendants agree that the term of payment was on a piece work basis and that the $45000.00 was a one time payment not a loan but more in the form of a good will payment to acquire the services of the 1st Defendant. It is agreed that there was oral agreement to the 3rd party work the possible extension to overseas work and that the payment of relocation expenses was agreed outside the written contract but not on a repayment basis.

[6] In light of this mutual rejection of the terms of the written contract it is necessary to consider the matrix of the arrangement between the parties and their conduct of the association to ascertain the actual terms on which they contracted. This starts with discussion between the principal of the Plaintiff Mr Worthington and the 1st Defendant in 2000 when the latter made a visit to Rarotonga at the former's expense. Stock was purchased by the Plaintiff. There were further discussions and the 1st Defendant prepared a document which was put to the Plaintiff in or about January 2001. This provided for a payment of $45000.00 which was described as "a payment to make this situation happen "now" rather than at some other time factor". The term was two years and on renewal no lump sum would be payable. It provided no private or any other work would be done without consent of the Plaintiff and that relocation expenses would be negotiated. That that proposal was accepted is confirmed in a fax message sent by the 1st Defendant to the Plaintiff on 14 March 2001. That fax also stated that he had signed the "original contract with no alterations" which I understand is a copy of the written contract described above.

[7] The 1st Defendant arrived in Rarotonga on 16 April 2001. In the meantime he had made written application to the Development Investment Board by letter dated 28 February 2001 in which he sought approval to set up a business to be associated with the Plaintiff under the name of the 2nd Defendant. Reference is made to this application in the fax of 14 March 2004 to the Plaintiff. Consent was given by the DIB on 9 May 2001. After the 1st Defendant arrived there was a meeting with DIB officers in which the temporary arrangement involving the NZ Company was approved. I am satisfied that the Plaintiff knew about this.

[8] The invoices for work done began with invoice dated 8 May 2001. It set out various works and items of jewellery under the name of the NZ Company. There was no calculation for GST or VAT. The invoices continue in this form till the invoice dated 28 August 2001. Thereafter invoices are in the name of the 2nd Defendant following its incorporation and include an amount for VAT. Payment was made by the Plaintiff by cheque for these invoices. The cheque butts show the name of the 1st defendant. The cheques were not in evidence before me.

[9] Work began to be done for 3rd parties in September 2001. On each occasion it was invoiced separately. The 1st defendant prepared a ledger account which was signed by Mr Worthington as correct and paid in full on 13 March 2002. It shows a list of the invoices and with a number of adjustments specifies a payment to the Plaintiff of 40 % of the mark-up calculated on the gross sales. That evidences the sharing arrangement between the parties and acknowledges payment in respect of the 3rd party sales. Mr Worthington said in evidence that he had signed the acknowledgement in a hurry to be rid of the dispute but he signed it and has not been able to suggest or give evidence that the figures are incorrect or that there was other 3rd party work done outside the agreed terms. I am satisfied that there was an agreement about 3rd party work between the parties and that it was settled and payment made by consent. The Plaintiff's claim on this head fails.

[10] This immediate departure from the terms of the written contract provides the evidence and the example of the parties' agreement to conduct the arrangement or engagement in a different way than had been drafted by the solicitor in the contract. The 1st defendant arranged to establish his company and to operate it as the medium of the arrangement with the Plaintiff. The Plaintiff as I find knew of this. Discussion with DIB settled the mode of operation and that was accepted by the Plaintiff and so the operation was conducted. In the end the contract between the parties was one of services in which the NZ Company provided the services of the jeweler the 1st defendant to be paid on a piecework basis by invoices without VAT and without any PAYE tax. This in effect replaced the written contract.

[11] The Plaintiff claims that the $45000.00 was agreed, as a change to the proposal, to be paid as a loan. It is not clear when in relation to the signing of the contract that alleged change occurred. It seems from Mr Worthington's evidence that he put to the 1st defendant that the arrangement could not go ahead with the payment which suggests a time before the contract. The difficulty is that the contract prepared at Mr Worthington's instruction by a solicitor does not say anything about a loan or repayment except in relation to the probation period. The Plaintiff does not propose in evidence any terms of the loan. On the contrary there is the document prepared by the Plaintiff which specifies the payment as a one-off payment and the contract provides similarly though the parties agreed that the work was to be paid for on a piece work basis. The $450000.00 was not the sole consideration in the contract. The Plaintiff called Grant Priest who had a number of conversations with Mr Worthington about the latter's proposal to engage a professional jeweler to bring his business "to the next level". Mr Priest was recalled to expand on his evidence which in essence was a casual discussion in which he had advised against paying money and proposed obtaining the jeweler for nothing. His recollection

required a second chance and was about something which had occurred sometime in the past on a casual basis. I do not consider this was confirmatory of Mr Worthington's assertions. Mr Baker has consistently denied any suggestion that the payment was a loan. I prefer his evidence and it has some confirmation in the contemporary documents and papers. I consider that the Plaintiff became disenchanted with the arrangement made and its development and a s an afterthought, helped by the discussions about possible funding through a EU scheme that the payment would be repaid. The Plaintiff's claim on this head fails.

[12] Reference was made to the relocation expenses but no specific claim or allegation is made that this was to be repaid or that it was a term of any contract. It is not referred to in the contract but is referred to in the 1st defendant's document of January 2001. There is a prayer for special damages in respect of the relocation expenses but there is no foundation for the recovery of them. They were paid willingly by the Plaintiff in addition to the "goodwill" payment and without any proviso or condition. In the end this is not a subject of claim or of breach and cannot be considered as part of the Plaintiff's case except as background. In any event I find that the relocation expenses were paid by the Plaintiff by agreement as part of the overall arrangement and like the $45000.00 were not subject to any repayment term.

[13] The Plaintiff claims that master patterns for the manufacture of jewellery were made by the defendants during the term of the contract and were not returned or accounted for to the Plaintiff. This is a matter specifically referred to in the contract and is something that would be expected especially in light of the large payment to obtain the services of the 1st Defendant. The evidence in support was produced in the form of copies of master pattern designs and allegations that items of jewellery made during the term of the arrangement were made from these patterns. I am satisfied on the evidence that the master pattern designs exhibited at the hearing were old patterns and that the defendants did not at any time during the contract term make any master patterns. The jewellery made during the term of it were all made from pre-existing patterns or were made as one-off designs by the 1st defendant. There are no master patterns to which the Plaintiff has any claim.

[14] Another claim against the defendants is that they entered into competition, contrary to the terms of the contract, in trade with retailers in Fiji and elsewhere. The contract restrains the 1st defendant from competing with the Plaintiff, though there ids no geographic limit to this. There is also an obligation to work exclusively for the plaintiff and not interfere with or endeavour to divert customers of it. In fact the proposed venture to Fiji undertaken by the 1st defendant was agreed to by the Plaintiff and it supplied pearls for the purpose. The pearls were said to be of poor quality and unsuitable for the purpose of the venture. This took place after the event known as 9/11 when there had been a downturn in trading in Cook Islands. The Defendants income had dropped and it was felt necessary to look for other business opportunities in which the Plaintiff would share by the sale of pearls. In the result the defendants made contact with a Fiji enterprise and supplied items of jewellery to it. In my judgment in the earlier injunction proceedings I expressed doubt about the extent of the non-competition term of the contract saying:

The trade outside the islands is in a different category, either because of the doubts as to the ambit of the arrangement or contract between the parties or because it extends beyond what may at first sight be reasonable under the agreement."
As I have indicated the parties did not restrict themselves to the written contract but amended these in various ways to adapt to the actual conduct of the arrangement. I find that on this particular item that the parties came to a special arrangement which was not adhered to by the Plaintiff. In any event it was not entitled to prevent the defendants from carrying on business outside the Cook Islands. In the circumstances the defendants were entitled to establish and develop the business in Fiji and elsewhere. This claim too must fail.

[15] There were a number of other matters alleged by way of breach of contract. They include a number of allegations of aggressive conduct toward the Plaintiff or Mr Worthington. They were not in substance denied. They are trivial matters which arose at a time that relations between the parties had become strained. There was an allegation that the 1st defendant had sold or attempted to sell pearls on his own account without the knowledge of the Plaintiff. Evidence from the Plaintiff's shop assistance about one or two occasions of selling or salesmanship by the 1st defendant was tendered. The details failed to show to my satisfaction that there had been any wrongful conduct or any ting which could be said to be contrary to the proper conduct of the arrangement between the parties. There was also a claim that the 1st defendant had failed to introduce and train a local Cook Islander to be a jeweler. This seems to have arisen from the proposal that the parties attempt to obtain a grant from an EU fund. Application was made but did not succeed. There was no evidence that any further request or thought was given to this expansion of the business. I do not consider that any or all of these items could or did amount to any breach of the contract arrangement as operated which could sound in damages. There were alternative claims for unjust enrichment and mistake but in light of the findings I have made there can be no basis for these claims to succeed.

[16] In the result then for the foregoing reasons I find that all the claims of the Plaintiff fail and there will be judgment for the Defendants. Costs are reserved in the absence of agreement Counsel may make submissions.