

BETWEEN : JOHN APPLEBY : Plaintiff

AND : TRICIA RUSSELL EMBERSON : Defendant

BEFORE THE HON. JUSTICE FINNIGAN

Counsel : Mrs P Tupou for Plaintiff
Mr S Tu'utafaiva for Defendant

Date of Hearing : 30 July 1999
Date of Judgement : 30 September 1999

JUDGMENT OF FINNIGAN, J

This is a claim by a law practitioner for legal fees. Both parties gave evidence, and were the only witnesses. The facts are simple and largely uncontested. The point of dispute is a difference of understanding about whether the lawyer's work was to be done for no fee.

This is not a dispute that normally should arise between a legal practitioner and a client. Without a fee there may be no contract. Without a contract the client may have no enforceable agreement and no enforceable contracted remedies.

The plaintiff had formerly acted as lawyer for the defendant and her former husband ("the husband") in respect of their affairs generally, and particularly in respect of their joint business affairs. In November 1994 the husband and the defendant were engaged in a matrimonial dispute. That dispute ran a fervent course for some time, and in late 1997 the plaintiff met both of those other parties at functions. The couple was no longer in violent dispute, and he learned that they were contemplating divorce. To each of them he said that he could "provide a free divorce" in order to finish the

matrimonial dispute. The couple discussed this offer and they both accepted it.

On 9 January 1998 there was a phone conversation between the plaintiff and the defendant. It was agreed that the plaintiff's legal services for a divorce would be provided free. The conversation then turned to the topic of what was called a separation agreement. At some stage the plaintiff had said to the defendant or to the husband, or both, that they could not get a divorce without putting arrangements in place, specially arrangements for their child. The Defendant had already reached agreement with the husband about their property and about provisions for their child. It was agreed during this phone conversation that there should be a document recording their agreed position vis-à-vis their daughter and the provision to be made for her from their joint businesses. The conversation went into some detail about that, with the plaintiff making notes of the defendant's instructions. The plaintiff said in evidence that he told the defendant that the agreement would be complex and would involve considerable work, and that while the divorce work would be "free", he would have to charge for the other work. He could not recall any answer from her. He thought she continued the discussion without answering.

Next day, 10 January 1998, the defendant prepared and gave to the plaintiff a draft that contained the agreements already reached between the couple. They had already settled many (if not all) of the complex issues. After that, the plaintiff prepared notes and questions and attended on the defendant. The discussion was detailed. Their intention was to produce a complete and firm agreement. The document was intended to protect the interests of the daughter and to form a basis for continued protection of her interests in the future business relationship of the couple. During the discussion the defendant mentioned that there was a lot of work involved, and the plaintiff, while he could not recollect his reply, said it was jocular and along the line that he had to do something to recover a fee for the divorce work. The plaintiff then prepared his draft. It contained 25 clauses and was entitled "Separation Matrimonial Property Custody and Maintenance Agreement". It

is clearly based on the defendant's draft. It included provision for continued separation, and provision that both parties would take the steps necessary to finalise their divorce. It provided that each party would contribute 50% of the total costs incidental to "this Deed of Separation and the divorce proceedings". It stated that all personal and joint properties had already been satisfactorily divided, so that each was deemed the owner of what each possessed. It contained also provision for custody of the daughter and for payment of maintenance for the child by the husband, and provisions requiring each party to maintain the value of their holdings in two companies and to contribute equally, including equally from a third entity, a partnership, to a trust fund for the daughter. There was provision for execution of wills and for pre-nuptial agreements preserving for the daughter the shares of each in the two companies if either should die or remarry. It also provided that the document would be presented to the Supreme court with the divorce petition, would be subject to order of the Court, and "shall be ratified and sealed by the Court in accordance with the divorce proceedings". It was sent to the defendant on 19 March 1998. There was also an associated draft of mutual wills, but this was not included in the document sent.

On 31 March the defendant acknowledged receipt and said she would advise if alterations were to be made. After that the plaintiff sent his account for the work related to the agreement. It was itemised, and made no charge for legal work associated with the proposed divorce petition. He sent this bill because he was about to sell his practice, and wished to finalise his receivables. The account, he said in evidence, was intended to cover the whole matter, including any work not yet done.

This brought two responses, the first from the husband who, in the draft documents, would have assumed a 50% liability for the fee. He refused to pay, stating that the plaintiff had said the work would be done for no charge. The second was from the defendant. She also refused to pay, saying that the work was to have been done for nothing, with no explanation at any time by the plaintiff that "the divorce and the separation" were

different or separate. In evidence she said she had additionally made it plain to the plaintiff earlier that she had spent more than enough in legal fees on matrimonial matters, for limited outcomes, and that she refused to spend any more. The draft document was never executed.

Both counsel made submissions, which I have considered. There was argument about the principles governing mistake and about the doctrine of *quantum merit*.

DECISION

As the submissions show, this is a claim in contract. A claim by a lawyer for fees should always be a claim in contract. The relationship between a licensed lawyer and a client should always be in contract. This is essential in my view for the protection not only of the lawyer, but also of the client. Without a contract, a client is severely limited in a claim against the lawyer, ie. Deprived of any contractual guarantee for performance of the legal work and for performance at a professional standard.

In the present case, the first question is whether there was a contract at all.

I accept that it was not the plaintiff or the husband who sought the legal services of the plaintiff, but it was the plaintiff who offered. He offered a "free divorce". It seems clear to me that the defendant thought there would be no fee when she agreed to the "free divorce" offer.

I accept that when the defendant telephoned to accept and discuss the plaintiff's offer, it was already clear to both that he would be doing more work than a simple divorce petition. I accept that the plaintiff on that occasion raised the matter of a fee, but did not obtain any clear answer from the defendant acknowledging that there would be a fee.

Up to this point, what was the arrangement between the parties? There was an offer by the plaintiff and acceptance by the defendant. What was the consideration? The plaintiff made the offer to do the work for a divorce

without charging a fee; the defendant agreed. Was there consideration from the defendant? All she gave was her acceptance. Is that sufficient? It cannot be. The plaintiff could not have sued on that arrangement, he had nothing to sue for. If the work had not been done, the defendant could not have sued, there was nothing for her to enforce. She gave nothing in return for the plaintiff's promise. If the work had been badly done, she had no remedy in contract.

What the plaintiff relies on is a claim that a contract was formed in a second arrangement. His evidence is that the parties agreed that there was extra work to be done and that he let the defendant know that he would be charging a fee for that. His evidence is that the defendant did not positively agree, but did not say anything. Taking those facts to be established by the evidence, do they amount to evidence of a contract, i.e. an agreement that he would do that work (a) as extra to the original agreement, and (b) for a fee?

The document produced under this claimed agreement confirmed the settlement of all property matters, and was in effect an agreement for custody and maintenance of the daughter. Further it stated (at clause H) that it was intended for production to the court along with the divorce petition, to be "ratified and sealed by the Court in accordance with the divorce proceedings". Thus to the lay mind as well as to the lawyer's, it was meant to be part of the divorce proceedings and to satisfy the requirements of the Divorce Act cap 29. For the legal mind, that must raise immediately the provisions of s11(1). For completeness I set them out here:

11. (1) Where the Court has granted a decree on the ground in section 3(1)(f), the decree shall not be made absolute unless the Court has certified:

- (a) that proper financial provision has been made for either party and any children of the family, or
- (b) that no such provision should be made.

Section 3(1)(f) is the ground for the divorce in this case, separation for more than two years.

The Plaintiff spoke good law when he told the couple at the outset that the divorce would need a further agreement. The defendant was right in understanding that one went with the other. To be complete at law, the work of obtaining a decree in divorce on the ground of two years' separation had to include obtaining a completed agreement or judicial finding that made proper financial provision for the child. As part of their petition to obtain a divorce on the ground of separation, the couple had to satisfy the Court that provision had been made for their daughter. The plaintiff's offer was necessarily an offer to do for nothing the work necessary to obtain the decree, which included satisfying the Court that proper financial provision had been made. The plaintiff, after his initial offer had been accepted, could not introduce a charge for part of the work without the express agreement of the defendant. The evidence does not support a finding that there was agreement for a fee. For that reason, the claim of the plaintiff must fail. Judgment is entered for the defendant.

Costs must follow the event. These are to be agreed or taxed.



Dominique J.
JUDGE

NUKU'ALOFA: 30th September 1999