IN THE SUPREME COURT OF NEW ZEALAND

SC 70/2010
[2010] NZSC 119

BETWEEN	SHAUN ROGER NIXON (WITHDRAWING PARTNER) AND MARTIN VICTOR RICHARDSON AND SHAUN ROGER NIXON AS TRUSTEES OF THE FIRM TRUST (NIXON TRUSTEES) Applicants
AND	GEOFFREY DONALD CAMPBELL WALKER, ROWAN JOHN CHAPMAN, TIMOTHY JOSEPH GOLDFINCH, MARTIN VICTOR RICHARDSON, DIANNE MAREE LUDWIG AND KURT SHERLOCK (CONTINUING PARTNERS) AND GOSLING CHAPMAN LIMITED (GCL) Respondents

Court: Blanchard, McGrath and William Young JJ

Counsel: S A Grant for Applicants
F J Thorp for Respondents

Judgment: 27 September 2010

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed with costs of $2,500 to the Respondents.

REASONS

[1] The applicant, Mr Nixon, shared in the first instalment of a goodwill payment made by two incoming partners of the Gosling Chapman firm. Those partners were admitted to the partnership on 1 April 2002. However, Mr Nixon gave notice of retirement as at 31 March 2004, and thus one day before the second and final

instalment from the incoming partners was to be paid, on 1 April 2004. Negotiations took place concerning the terms on which Mr Nixon would be a consultant to the firm. It was announced to the staff that after his retirement Mr Nixon was to be a consultant.

[2] In fact, before the date on which he was to retire, Mr Nixon made arrangements to move to another accounting practice. The other partners then proposed that he should immediately withdraw from the partnership, i.e prior to the announced retirement date, in default of which they said they would call a meeting at which his expulsion would be moved. Mr Nixon left the firm on 9 March 2004 and started work with the other firm the next day.

[3] There was an issue between the parties as to whether in these circumstances Mr Nixon was entitled to share in the second instalment of goodwill. The partnership deed also provided that where a partner retired not more than 24 months (i.e 24 months or less) after the admission date of a new partner, the retiring partner must refund part of the goodwill received by him from the new partner. A second issue arose as to whether Mr Nixon must make a partial refund to the partners admitted on 1 April 2002.

[4] A third matter concerned Mr Nixon's claim for breach by the firm of the consultancy agreement he said he had negotiated with the firm.

[5] The issues were referred to the arbitration of the Hon Robert Fisher QC. He found that Mr Nixon did not qualify to share in the second instalment as, even if the events of 9 March had not occurred, it had been his intention to cease to be a partner before 1 April 2004. On that basis also, the arbitrator found that Mr Nixon was obliged to make a refund to the incoming partners. The arbitrator said that, in the event, Mr Nixon had accepted termination of his partnership as at 9 March 2004. He further found that, despite the announcement to staff, the negotiations for the consultancy had never reached the stage of any final agreement before Mr Nixon left the firm. His claim based on the existence of such an agreement (and breach of it by the firm) therefore failed. He was ordered to make a refund payment to the new partners together with interest thereon and to pay a substantial sum as a contribution

to the respondents' legal fees and disbursements, including part of the arbitrator's costs.

[6] Mr Nixon obtained leave to appeal to the High Court on questions of law relating to the goodwill payments and the existence of the consultancy agreement (or the respondents' inability by reason of estoppel to deny the existence of a consultancy agreement). The High Court dismissed the appeal[1] but granted leave for an appeal to the Court of Appeal. That appeal proceeded on the basis that Mr Nixon had retired from partnership on 9 March 2004 since he had not been given leave by the High Court to challenge the arbitrator's finding on that point. In disagreement with the arbitrator and the High Court, the Court of Appeal concluded[2] that the partnership terms did not require that, in order to share in the second instalment, Mr Nixon should have remained a partner at the time when the second instalment of goodwill fell due for payment. It held that he was therefore entitled to share in the second instalment.

[7] But that did not, in the result, assist him because, as the Court of Appeal explained, there had been a corresponding error in his favour in the calculation of the amount of the refund. The Court of Appeal also found against Mr Nixon on his argument that there had been an agreement by conduct upon a consultancy. It also rejected his appeal ground asserting an estoppel preventing the respondents from denying the existence of any consultancy agreement.

[8] Although counsel for the applicant does not appear to question the correctness of the arithmetic in the Court of Appeal's reasons for judgment, an argument is sought to be advanced in this Court that it was not open to the Court of Appeal to make an adjustment so as to arrive at what appears arithmetically to be the correct result. Counsel thus seems to be contending that this Court should hear the appeal and change the result in the case to one which would not reflect what was actually required by the terms of the partnership agreement, and moreover should alter the costs award below as a consequence of making that change. The proposed argument raises an issue confined to the particular facts and pleadings and obviously

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1 *Nixon v Walker* HC Auckland, CIV-2007-404-1372, 12 December 2008 per Keane J.
2 *Nixon v Walker* [2010] NZCA 273.

does not reveal any miscarriage of justice. The same applies to the proposed further arguments that no refund payments were in fact due by Mr Nixon and that the Court of Appeal erred in its conclusion, confirming the arbitrator and the High Court, that the claim relating to a consultancy agreement was not sustainable.

Solicitors:
Boyle Mathieson, Auckland for Applicants
Fleming Foster, Manukau for Respondents