IN THE DISTRICT COURT
AT MANUKAU

CIV-2015-092-002103
[2017] NZDC 22766

BETWEEN	INNOVATIONS DEVELOPMENT GROUP INTERNATIONAL Plaintiff
AND	KANI HUNIA Defendant

Hearing: 10 May 2017

Appearances: Michael Keall for the plaintiff
John Kahukiwa for the defendant

Judgment: 6 October 2017

DECISION OF JUDGE RECORDON

Background

[1] The plaintiff company and the defendant had a common goal. That goal was the development of a geothermal power project. The plaintiff company Innovations Development Group International ("IDG") is a US company based in Honolulu, Hawaii. The company helps indigenous owners around the Pacific area through joint venture partnerships, offering investment capital and additional expertise.

[2] The defendant is a Trustee of the Kawerau A8D Ahu Whenua Trust (The A8D Trust). IDG saw the A8D Trust as an opportunity to promote a sustainable geothermal energy project in the central North Island area.

[3] The original Trustees in the A8D Trust were Tomairangi Kiira Lance Fox (TKLF), Colleen Skerrett-White ("CSW"), and the defendant Kani Hunia (Mr Hunia.

[4] On 17 August 2010 IDG, the A8D Trust and Eastland Generation Ltd (EG) became partners in the development of a geothermal power project pursuant to a project development agreement. EG is behind the development of the power project.

[5] The proceedings came into being because the defendant personally incurred legal costs in the amount of $48,383.41 including GST, spent on legal action in the Māori Land Court in respect of the conduct of the co-Trustees of the A8D Trust. The agreement with the defendant was that IDG would pay Mr Hunia's reasonable legal costs. The agreement originated in October and November 2010 ("the loan agreement"). The agreement was verbal between a senior advisor to IDG, Roberta Cabral, and Mr Hunia.

[6] There was no specific date for the repayment of the advances. Ms Cabral's evidence was that the payment of legal fees was discussed as a loan.

[7] There was a common purpose from the outset and a comfortable arrangement between the plaintiff and the defendant having its core in shared cultural values and backgrounds, and also the power project development. Mr Hunia began working on the geothermal project in an individual capacity thanks to Ms Cabral finding him a job there beyond his role as a Trustee.

[8] In addition to the $48,383.41, in February 2011 the sum of $1,427.63 was paid by the plaintiff to the defendant to purchase a computer.

Submissions

[9] The defendant says that the $1,427.63 for the purchase of a computer was a gift, the plaintiff says it was a loan.

[10] The plaintiff argues that it was never their intention that the monies advanced for the Māori Land Court proceedings were on a never-never (lay-by) basis as far as repayment was concerned. They say they expected the Māori Land Court proceedings to be well and truly over a number of years ago but as at the date of the hearing, there was no indication of much progress with those proceedings.

[11] An email relied upon by the plaintiff is dated 7 October 2010 and found on page 120 of the supplementary common bundle. It is from Loretta Lovell to the defendant with both John Kahukiwa (lawyer for the defendant) and Ms Cabral copied in. It reads:

> "Kia ora Kani, I have instructions from IDG that they will advance funds to you as an A8D Trustee to cover the Corban Revell costs set out below up to a fixed cap of the amount of NZ$6,933.75 including GST and disbursements only. Payment will be made within 14 working days following receipt of invoice by IDG after completion of the work. It is IDG's view that this funding is an advance only, recognising the Trust's lack of funds currently therefore where any or all of this funding is able to be recouped from any other source or the Trust comes into funds itself, payment is conditional upon IDG being reimbursed. Can you please confirm by email your acceptance of these terms."

[12] It is of significance that the defendant alone has been asked to repay the monies. Mr Hunia is also a beneficiary as well as a Trustee. The plaintiff saw him as isolated and in need of help. He could hardly be expected, argues the plaintiff, to ask his Trustees for financial help from the Trust when his intended Māori Land Court action was to apply to remove his fellow trustees.

[13] CSW was removed from her position as a Trustee on 18 October 2011 after she was adjudicated bankrupt. There were a series of hearings in the Māori Land Court including one scheduled to proceed 14 December 2014 with the plaintiff arguing that they deferred their attempts to recover advances made to Mr Hunia until after that hearing. In particular, in the hope that Mr Hunia would be in a better position to repay the debt depending on the success of his action, or otherwise. The plaintiff communicated this to Mr Hunia's lawyer in a letter as part of the bundle on 26 November 2014. There was communication between the lawyers in response to the plaintiff's letter enquiring about repayment of the debt on 7 June 2015. The defendant's lawyer wrote "Kia ora Michael, as you will know and appreciate the matter including my client's application for costs is entirely in the hands of Judge Harvey who has reserved his decision."

[14] The plaintiff's statement of claim set out the loan advances and the dates thereof and argues in paragraph 10 "a reasonable period of time for the repayment of the loan advances in full expired no later than two calendar years after the last loan advance on or about 20 December 2011". The statement of defence denies there was a term implied or otherwise regarding the date of repayment with the key terms of repayment that he would "vigorously pursue the said applications to the Māori Land Court" and that the monies paid and received, repayment were conditional on the applications to the Māori Land Court finishing, being successful and being coupled with a costs order". He argues that the payments made were not in the nature of loan advances and that the plaintiff knew that the defendant was "personally impecunious" and wanted to pursue the applications in the Māori Land Court.

The Evidence

[15] Ms Cabral and Mr Hunia both gave evidence as per their briefs, which were prepared and exchanged. Mr Hunia referred to the formation of the Trust over the ancestral Māori land called "Kawerau A8D land" containing the geothermal bore. Mr Hunia is an owner of the land. The arrangement went back to 2005 when the Trustees decided to commit their Whenua (land) and their bore to a geothermal energy project to provide revenue and employment to the owners. IDG was given the exclusive right to develop the geothermal resource back in 2008 for the payment to the Trust of $360,000.

[16] Mr Hunia set out in his evidence the problems that he as a Trustee had with the other Trustees and concerns at possible misappropriation of Trust monies. He refers to the common goal of getting CSW off the Trust, to stabilise the Trust and get the project running and start making money. This review of the repayment date was that it would be at the point in time when the applications were finished in the Māori Land Court, CSW was removed and "things were put right".

[17] There were other complicating factors including a decision by Judge Harvey on 31 August 2016 to remove all the Trustees of the Trust with the exception of one, Andrew Kusabs. This was further complicated when the Māori Appellate Court on 30 March 2007 held that in stating that the Trustees were removed, Judge Harvey

was not making a final order for removal. The defendant says that his appeal is sitting in abeyance. He says that his trusteeship is at best doubtful.

[18] As far as the alleged debt is concerned to the plaintiff, he says that the actions he took benefited the Trust and his fellow owners, that he took a stand and the litigation was needed to put the Trust on its feet. He also said the computer was a gift. In the course of the hearing, however, the defendant conceded the monies were repayable once the Māori Land Court proceedings were finalised.

[19] The plaintiff's view is that Mr Hunia was the plaintiff's friend and he was paddling his canoe on his own and they were helping him. They shared similar values, as Hawaiian and Māori cultures are both focussed on whanaungatanga (personal relationships). The plaintiff says that Mr Hunia came to them for help to remove his fellow Trustees and this was not so much as a Trustee but as a beneficiary and the monies were lent to Mr Hunia personally.

[20] The plaintiff argues that the timing of the repayment is more as per the statement of defence paragraph 5.2(a), (b) and (c) rather than 12.5 of Mr Hunia's brief of evidence. That repayment had to be within a reasonable time and that Mr Hunia was being paid $60,000 a year in his role working for the development company and it was time that the monies were repaid.

[21] Mr Hunia hinted in his evidence that the plaintiff would never have asked for the monies had the plaintiff still been involved in the project. Their role in the project had ceased, hence they wanted what they saw as their loan monies back.

[22] Mr Hunia says some of the monies had been repaid by borrowing money and the amount repayable now is $35,244.39. This is accepted by the plaintiff.

The Law

[23] The plaintiff directed me to a passage from D W McMorland *The Sale of Land* (3rd ed, Cathcart Trust, Auckland, 2011) at 541 which says:

> Where a contract has not specified a time for the performance of the promise, "it is trite law that (a promise has) to be performed within a

> reasonable time. What is a reasonable time must be determined upon all the circumstances of the case.". In these situations, time is not initially of the essence, but, after a reasonable time has passed, the promise may give notice making time of the essence.

[24] McMorland cites *Mt Pleasant Estates Co Ltd v Withell* for this statement of the law.[1] In a High Court case before Tipping J the plaintiff waited only two months before cancelling a conditional contract that did not stipulate a time by which the condition must be met.[2] The plaintiff's application failed as they did not give notice making time of the essence, and the period waited was not "so extreme that the serving of a notice might be excused".[3] Tipping J went on to express the Supreme Court's majority opinion in *Steele v Serepisos* which is in itself a succinct summary of this area of law.[4] Tipping J stated:[5]

> "In essence those cases confirmed that if no time is prescribed by the contract for fulfilment of a condition, or for completion, the law provides that these events must take place within a reasonable time. What amounts to a reasonable time is a question of fact which depends on the circumstances of the particular case. Where no time is contractually prescribed for completion, there is no basis for regarding time as being already of the essence. Therefore, the equitable requirement of a notice making time of the essence for completion applies."

[25] In written submissions the defendant contended that payment of the loaned money was conditional on the resolution of the Māori Land Court proceedings. However, during the course of the trial Mr Hunia ultimately conceded that payment of the loaned money was due. In effect this resolves the main issue before me, however for the sake of completeness I note the following.

[26] The original agreement as found in the contents of emails between the parties did not create a date for repayment, instead leaving it conditional upon the resolution of the litigation to remove CSW as a Trustee. While it must be noted that there remains uncertainty as to the disposition of the Māori Land Court application, appeal, and decisions, the original intention of the litigation was achieved some years ago with the removal of CSW as a Trustee through her bankruptcy. Mr Hunia has continued with his life, in setting out his circumstances to the Court he detailed

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[1] *Mt Pleasant Estates Co Ltd v Withell* [1996] 3 NZLR 324.
[2] At 326.
[3] At 333.
[4] *Steele v Serepisos* [2006] NZSC 67.
[5] At [46].

inheriting a property. Furthermore, the plaintiff is no longer involved with the contract and arrangements.

[27] As noted in *Steele* where a conditional agreement fails to set a date by which the condition must be met, the condition must be met within a reasonable time. *Mt Pleasant Estates Ltd* gives some guidance as to what is considered reasonable. The plaintiffs loaned the defendant funds for litigation between 1 October 2010 and 20 December 2011, they then proceeded to wait almost three years before requesting repayment on 26 November 2014. Further notices demanding repayment were issued to the respondent on 5 June 2015, and 11 August 2015. The plaintiff asserts a reasonable period was two years and the money is well and truly repayable now.

[28] The statement in *Steele* is that the equitable requirement of a notice making time of the essence applies where a time period is not set. *Mt Pleasant Estates Ltd* suggests there may be extreme cases where this requirement does not apply. This may be one of those cases, however, as noted above, the plaintiff gave multiple notices to the defendant over a seven month period. This equitable requirement is thereby met and no argument remains but that the monies lent for the removal of the Trustees is repayable. The time to repay has fallen due and I order accordingly.

[29] As far as the computer is concerned, in *Narayan v Narayan* [2015] NZFLR 128 (HC) Justice Wylie noted that the presumption of advancement can be rebutted by evidence showing that there was no intention to benefit the alleged donee by way of gift:

> "The presumption of advancement can be rebutted by evidence showing that there was no intention to benefit the alleged donee by way of gift. A contemporaneous act or declaration by the alleged donor will suffice. Acts or declarations by the donor subsequent to the purchase or the transfer, unless so connected with it as to be reasonably contemporaneous, are not admissible in favour of the donor to rebut the presumption – see *The Laws of New Zealand – gifts* at para 47 in cases there cited; *Halsbury Laws of England* (4 ed, 1973) Gifts, Volume 20(1) at para 48."

[30] *Williams v Williams* sets out the three essential elements of a gift:[6]

(a) the expression of the intention of the donor to make a gift;

[6] *Williams v Williams* [1956] NZLR 970 at 972.

(b) the assent of the donee to the gift; and

(c) the actual or constructive delivery of the gift.

[31] Intention of the donor to make a gift is at issue. Had the plaintiff still been involved in the contract and their work with the project continuing I have little doubt that the computer would have been viewed more as a gift than as a part of the loan package. As such the *Williams* test is met and I hold accordingly that the computer is not recoverable nor repayment for the computer costs.

Conclusion

[32] I order that the plaintiff's advance to the defendant of $35,244.39 is now due for payment.

[33] I order that the $1,427.63 was a gift to the defendant which is not recoverable by the plaintiff.

P Recordon
District Court Judge