IN THE COUNTY COURT OF VICTORIA

Revised
(Not) Restricted

AT MELBOURNE
CIVIL DIVISION
COMMERCIAL LIST PILOT

Case No. CI-06-03087

MIDDLETONS (A FIRM) Plaintiff

v

MERIDIAN FINANCIAL PTY LTD & ANOR Defendants

JUDGE:	HIS HONOUR JUDGE ANDERSON
WHERE HELD:	Melbourne
DATE OF HEARING:	14, 16 & 19 February 2007
DATE OF JUDGMENT:	6 March 2007
CASE MAY BE CITED AS:	Middletons v. Meridian Financial Pty Ltd & Anor
MEDIUM NEUTRAL CITATION:	[2007] VCC 395

REASONS FOR JUDGMENT

Catchwords: Legal costs – Whether the firm was retained by the first defendant – Whether a "costs agreement" had been entered into – Consequences of failure to comply with the disclosure requirements of the *Legal Practice Act* 1996 – Effect of representations by a director that legal costs would be paid when compensation payments received.

APPEARANCES:	Counsel	Solicitors
For the plaintiff	Mr P J Riordan SC with Mr R Antill	Middletons
For the first and third defendants	Mr G S Lucas	Fitzpatrick Teale

HIS HONOUR:

1 Middletons acted as solicitors for the first defendant, Meridian Financial Pty Ltd (Financial) in Federal Court proceedings against Australian Unity Limited and an associated company (Australian Unity) in August 2003. The firm was properly retained, a written costs agreement was entered into and the disclosure requirements of the *Legal Practice Act* 1996 were followed. The proceedings related to an agency agreement between the parties to the litigation. Following mediation, a Deed of Settlement was executed which provided for a franchise agreement to be entered into between Australian Unity and a new company to be nominated by the Meridian Interests. Meridian Retail Pty Ltd (Retail) was incorporated for that purpose.

2 The franchise agreement operated satisfactorily for a year or so until changes of management occurred at Australian Unity. In August 2005, Australian Unity served a Notice of Termination of the franchise agreement. If the Notice were effective, Australian Unity would be permitted retake possession of the franchise operation on 30 June 2006, although it would be required to pay significant compensation to Retail. Middletons were retained to represent the Meridian interests in the dispute although issues arise as to which company retained the firm and whether a costs agreement was entered into. The disclosure requirements of the *Legal Practice Act* were not followed.

3 In this proceeding, Middletons have contended that the later dispute was simply a continuation of the earlier dispute in 2003. In March 2006, proceedings were instituted in the Supreme Court of Victoria with Retail as the plaintiff and Australian Unity as the defendant. The action went to trial on 23 May 2006. The judgment given on 21 June 2006 was unfavourable to Retail. The validity of the Termination Notice was upheld. Australian Unity paid Retail the “significant change compensation” on about 15 July 2006.

4 The instructions for Middletons to act in August 2005 were given by Mr Rowan Currie. Mr Currie has, at all relevant times, been a director of Financial. By reason of that position and the fact that Financial held a financial services licence, Mr Currie was not permitted to be a director of Retail. He was, however a substantial shareholder and acted as that company’s principal consultant.

5 The present action is a claim for the balance of legal fees allegedly owing in respect of the dispute with Australian Unity in 2005 which culminated in the unsuccessful

Supreme Court proceeding in 2006. Mr Anthony Watson was the partner at Middletons responsible for the matter. A number of bills were rendered by Middletons to Financial and were fully paid within the period requested, namely 14 days. The accounts were in fact paid by Retail (although this fact was not known to Mr Watson at that time).

Tax Invoice	**Date**	**Amount**
555422	30 January 2006	$ 4,676.35
557733	24 February 2006	$10,615.64
560086	31 March 2006	$17,945.84
561601	27 April 2006	$21,248.01
	TOTAL	$54,485.84

6 Later, bills were rendered to Financial and remained unpaid. They are the subject of the present action.

Tax Invoice	**Date**	**Amount**
563080	24 May 2006	$70,573.77
564303	31 May 2006	$60,878.14
564718	5 June 2006	$23,244.70
565888	27 June 2006	$ 7,387.26
567356	11 July 2006	$ 6,900.00
568214	28 July 2006	$16,317.43
569895	28 August 2006	$ 811.03
573490	17 October 2006	$ 360.80
	TOTAL	$186,473.13

7 This proceeding was commenced on 30 August 2006 naming three defendants; Financial, Retail and Mr Currie. The Statement of Claim alleged that Middletons had been engaged to act in the franchise dispute "on behalf of the first and second defendants". The balance of the fees of $186,473.13 was claimed against each of these defendants.

8 In its Defence the second defendant, Retail, pleaded that no bill had been rendered to it and relied upon the provisions of s.106 of the Act which made this a pre-condition

for action. Subsequently, in November 2006, Middletons served bills addressed to Retail. Retail gave notice pursuant to s.115 of the Act that they required the bills to be taxed by the Taxing Master of the Supreme Court. A taxation is pending in the Supreme Court and a hearing is set down to commence on 23 April 2007 to determine, as a preliminary issue, the basis for the engagement of Middletons.

9 As a consequence of the service of the Notice by Retail requiring the taxation of the bills, s.115(3)(b) of the Act provided that this proceeding should not have been commenced until the taxation had been completed. Accordingly, the claim against Retail was stayed and the Statement of Claim was amended to remove Retail from the proceeding and to simply allege an engagement to act on behalf of Financial in the dispute. Defence counsel, Mr Lucas, on behalf of Financial, informed me that there was no dispute that Retail had retained Middletons in the franchise dispute with Australian Unity. He submitted, however, that there was no retainer or costs agreement entered into by Financial.

10 Mr Currie is joined as a defendant on the basis of a conversation Mr Watson says occurred on 5 June 2006. Mr Watson said he raised with Mr Currie the fact that $130,000 was owing and that this sum needed to be reduced. Mr Currie allegedly responded that Middletons would be paid when compensation was received from Australian Unity. Mr Watson said that on this basis he accepted that Middletons would continue to act and the firm later filed an appeal in the Supreme Court proceeding on behalf of Retail. Mr Currie denied in evidence any conversation with Mr Watson for the payment of the firm's fees from the Australian Unity compensation payments.

11 The issues raised in the proceeding are:

a. Whether there was an engagement of Middletons on behalf of Financial.

b. Whether the costs agreement entered into in 2003 carried over into the work performed by Middletons in relation to the 2005 dispute.

c. Whether Middletons are entitled to recover from Financial.

d. Whether Mr Currie made representations to Mr Watson on about 5 June 2006 which entitle Middletons to recover damages from him personally.

The retainer of Middletons in 2005

12. The litigation in 2003 was resolved by a Deed of Settlement executed by the parties on 5 September 2003. The Deed provided in part that Financial and an associated

company which was a party to the litigation, Meridian Asset Management Pty Ltd, "absolutely and irrevocably release and forever discharge Australian Unity and AURN [an associated company] and their related parties from all or any claims which they have or, but for the execution of this Deed, may have had against Australian Unity" … The Deed otherwise provided that Financial would nominate a company it intended to be the franchisee under a franchise agreement to be granted by the Australian Unity interests and, upon that happening, the agency agreement Financial had entered into with Australian Unity in September 1999 was terminated.

13. On 18 October 2005, Australian Unity gave notice to Retail terminating the franchise agreement. The basis of the termination was that there had been a "significant change" as defined in the agreement. A successful termination on this basis would give rise to a liability on the part of Australian Unity to pay "significant change compensation" which had been calculated by Australian Unity at approximately $714,000.

14. On 2 August 2005, Mr Currie contacted Mr Watson. He said that the Meridian interests were in dispute with Australian Unity and he had spoken with Mr Chris Nikou, the Middletons partner who had finalised the settlement in 2003. Mr Nikou had told Mr Currie that Middletons could not act as Australian Unity was now its client. Mr Currie asked Mr Watson to intervene. Mr Watson made some inquiries from the Middletons partner who was responsible for the Australian Unity work. It was considered that if the matter were an ongoing dispute, it would be satisfactory for Middletons to act. Australian Unity was consulted and they agreed to this course and Mr Watson informed Mr Currie that Middletons would be able to act on the basis that the new dispute was a continuation of the earlier matter. Mr Currie said in evidence that his recollection was that he had been annoyed at Mr Nikou's response as the Meridian companies had spent thousands of dollars solving the original problem and Middletons were aware that there might possibly be further issues that could arise.

15. On 9 August 2005, Mr Watson instructed his personal assistant to open a new file because the file of the earlier dispute had been archived. Mr Watson noted that the

client was "Meridian Financial Pty Ltd" and he described the matter as a "franchise dispute". He estimated the fees arising from the matter at "$2,000". Mr Watson made a brief file note of the nature of the dispute. He recorded Mr Currie telling him that he thought Australian Unity wanted "to get franchise back from us". The next contact appears to have been on 20 October 2005. Mr Currie forwarded to Mr Watson documents attached to a Financial “with compliments” slip with a short note from Mr Currie. The documents sent to Mr Watson included correspondence between the parties signed by Mr Currie as a director of Retail and addressed to Australian Unity, although in fact he was not a director of Retail. On 7 November 2005, Middletons forwarded a letter of advice addressed to Mr Currie at Meridian Financial Pty Ltd.

16. It is essentially these facts which Middeltons rely upon as constituting an engagement or retainer of Middletons by Financial in about August 2005. Mr Lucas submitted that essentially the dispute was between Retail and Australian Unity, as was made clear by the documents forwarded by Mr Currie to Mr Watson, and that it was never intended that legal services would be provided by Middletons to Financial. Mr Currie gave evidence that Retail, as an Australian Unity franchisee, did not have its own letterhead and this was why he had used the Financial “with compliments” slip.

17. This issue must be determined as a matter of contract. It seems clear that both Mr Currie and Mr Watson understood that the dispute was in some way a "continuation" of the 2003 dispute which had been resolved by the Deed of Settlement and the granting of a franchise to Retail. Mr Currie wanted Middletons to act because the firm was familiar with the dispute from the events in 2003 and Mr Watson had clarified that the only basis upon which the firm could act, in the circumstances of a potential conflict, was because the 2005 dispute had its genesis in the 2003 dispute. During the 2003 dispute, the primary contact had been with Mr Garth McLardie, a director of Financial, although Mr Currie had been also involved in the earlier litigation and the settlement of the proceeding.

18. Mr Watson, in his evidence, raised the possibility that Financial may have had a

cause of action against Australian Unity based on the negotiations which had preceded the entry into of the Deed of Settlement. I was referred to a passage in an email from Mr Currie to Mr Watson dated 30 January 2006 where Mr Currie stated, "Nobody has discussed why the special agreements reached in mediation are not protecting us now, i.e.: the agreement that this deal would go its full term and that the lease would be renewed without fail at the middle of our contract etc". A mediation was proposed to attempt to settle the 2005 dispute. However, this was only held because it was one of the processes required by the franchise agreement between Retail and Australian Unity. The issues raised at the mediation were limited to the parties' rights under the franchise agreement. The position paper for the mediation described the disputing party as Financial, although it is clear from the terms of the paper that Retail was the relevant Meridian interest referred to.

19. I must, however, look at the situation at the time the instructions were given by Mr Currie in August 2005. In my view, it is clear, at that stage, that the intention of the parties was that Middletons would accept instructions to act on behalf of Financial in the continuation of the earlier dispute and that Financial retained Middletons to act on behalf of the Meridian interests in August 2005.

20. The relevant facts which lead to this conclusion are -

   a. The initial discussion between Mr Watson and Mr Currie defined the dispute by reference to the earlier dispute in 2003. There were issues arising from the settlement of that proceeding and Mr Currie considered Middletons had an obligation to continue to act because of its involvement in the earlier proceeding. The potential conflict was resolved on the basis that Middletons should act if the matter involved the continuation of an earlier dispute.

   b. Mr Currie forwarded the initial documents with a “with compliments” slip from Financial. He was not in fact a director of Retail and if Mr Watson had turned his mind to this question, he would have known that Mr Currie could not be a director because of the terms of the earlier settlement. Mr Watson had a new file opened in the name of Financial, subsequent advice was addressed to Mr

Currie and Financial, and ultimately bills were sent to Financial.

21. As the dispute proceeded, it became apparent that the issue in dispute was whether the franchise granted to Retail could be terminated by Australian Unity and that any proceedings would need to be issued in that company's name. Mr Lucas conceded that an implied retainer would have arisen in respect of Retail, at least by the time proceedings were issued in 2006.

Costs agreement

22. Middletons claims that a costs agreement was made between the firm and Financial in 2005. In the absence of a costs agreement, the firm would only be able to recover legal costs "in accordance with an applicable practitioner remuneration order or scale of costs" (s.93(b) of the Act). By s.96(2), the costs agreement "must be written or evidenced in writing". The pleading of the agreement in paragraph 13 of the Statement of Claim alleges the agreement was partly in writing insofar as it was constituted by a letter dated 23 August 2003 which was signed and acknowledged by Mr McLardie on 26 August 2003.

23. The letter dated 23 August 2003 was accompanied by "a statement containing details of our legal costs and disbursements, billing arrangements and other matters required by the Legal Practice Act 1996". Under the heading 'Method of Costing Legal Services' the document stated, "Our professional fees are calculated according to the time spent by our legal professionals acting for you. Each operator has an hourly rate based on the operator's seniority and expertise. The present hourly rate for Tony Watson is $420 and the present hourly rate for Lisa Egan is $280. We will notify you of any changes in the hourly rates". There was also disclosure in relation to "disbursements". The statement included the following passage, "We will let you know in advance if we anticipate that a substantial disbursement will be incurred". The estimated legal costs given in the statement were for the "application for interlocutory relief and to attend the hearing to be $20,000" and "to attend the mediation", further fees and disbursements of $8,000.

24. Middletons seek to rely upon the letter and statement in 2003 as setting out the basis upon which costs would be paid by Financial for the further work to be done pursuant to the retainer in 2005. Plaintiff's senior counsel, Mr Riordan SC, submitted that it was to be implied from the retainer in 2005 that legal costs were to be charged in accordance with the hourly rate applicable from time to time in respect of the persons doing the work on behalf of the firm.

25. In cross-examination, Mr Currie conceded that he thought this would be the basis on which Middletons would do further work in 2005, although he said that he was unaware what was the basis of the calculation of fees. During cross-examination, correspondence from 2003 was put to Mr Currie which showed that he had queried the quantum of the fees charged in 2003. It is likely therefore that he would have at least known that the fees were based on hourly rates charged by the solicitors working on the dispute.

26. I am not, however, satisfied that there was a costs agreement entered into in 2005. At best, it might be suggested that because the parties had two years earlier conducted similar litigation and Middletons had charged on a particular basis, it was likely therefore that each of the parties would have understood that any further work in 2005 would be performed on the same basis. The legislation requires the costs agreement to be written or evidenced in writing. To succeed, the plaintiff must establish that the agreement reached in 2005 was to the effect that the basis for charging legal costs would be similar to the arrangement in 2003. At best, as I have said, Mr Currie engaged the plaintiff in 2005 knowing that the plaintiff had performed similar services in substantial litigation conducted on behalf of the company two years earlier and, probably, that the firm had charged for those services on a particular basis.

27. Section 96(3) provides that "a costs agreement may consist of a written offer that is accepted in writing or by other conduct". It is not clear whether that sub-section is intended to qualify or elucidate the requirements of sub-s.(2). The plaintiff says that the only documents it relies on as evidencing the agreement are the earlier

documents from 2003. I do not consider in the circumstances that there is any basis for concluding that those documents provide evidence of a costs agreement in 2005. There was no discussion between the parties specifically referring to the earlier costs agreement or to any other sufficient basis for implying that the parties intended to reach a similar costs agreement in 2005.

28. Further, there is a difficulty translating the 2003 disclosure statement to the dispute in 2005. The charge out rates in 2005 had increased, as is evidenced from the bills that were later rendered, and there was no notification to Financial of "any changes in the hourly rates". Also, in 2005 and 2006, substantial disbursements were incurred in the form of counsel's fees, transcript costs and the payment of the mediators' fee. One would have expected that, pursuant to the earlier disclosure statement, advance notice would have been given of these matters to Financial. Similarly, the estimates for legal costs and disbursements given in the 2003 disclosure statement had no relevance to the 2005 dispute.

29. Another matter which influences my decision is the general structure of the disclosure provisions in the Act. The 2003 letter and statement were effectively the firm's compliance with the disclosure requirements of s.86. In 2005, no attempt was made to comply with the disclosure requirements. Mr Riordan submitted that the only consequence of this failure to give information was that, by s.91(a), when a Bill of Costs was taxed, some reduction might be made "proportionate to the seriousness of the failure to give the information" In my view, the requirements in s.86 have a more fundamental consequence in the present case.

30. By s.90, it is clear that the s.86 disclosure statement is required unless the circumstances come within certain narrow exceptions, for example, if the total legal costs are not likely to exceed $750 or the firm has made a similar disclosure at least once in the previous 12 months and the client agrees in writing to waive the right to the statement. Further, when one examines the type of information that must be provided in a disclosure statement, it is clear that the provision of the statement is a fundamental obligation of a solicitor who is retained to perform legal services.

31. In those circumstances, it would be appropriate to take the statutory procedures into account when considering whether to imply the existence of a costs agreement where the only written component was an earlier disclosure statement two years previously relating to litigation conducted at that time. In my view, there is no basis for concluding that any particular agreement was reached between Middletons and Financial in August 2005 which would constitute a costs agreement.

Representations by Mr Currie

32. The plaintiff relies upon the statement made by Mr Currie in a telephone conversation with Mr Watson on about 5 June 2006. It is alleged that Mr Watson raised with Mr Currie "the issue of payment of the then outstanding fees and disbursements owing to the plaintiff" and Mr Currie "in order to induce the plaintiff to continue undertaking work and incurring disbursements in respect of the Supreme Court proceeding advised Mr Watson in his own capacity and/or for and on behalf of the first defendant that he would ensure that the plaintiff's tax invoices then outstanding and any further tax invoices rendered by the plaintiff thereafter would be paid from the significant change compensation" to be paid by Australian Unity to Retail on 30 June 2006.

33. The plaintiff makes alternative claims against Mr Currie on the basis that his representation constituted a collateral agreement for the payment of present and future tax invoices, was otherwise misleading and deceptive conduct in contravention of the provisions of the *Trade Practices Act* and/or that he was estopped from departing from the representations.

34. Mr Watson said that he believed he had a telephone conversation with Mr Currie on 5 June 2006. He nominated that date because he believed the conversation about fees followed a conversation about the litigation. The trial had concluded a few days earlier and Mr Watson prepared a file note of a telephone conversation from Mr Currie on 5 June 2006, apparently of two units of time (more than six but less than 12 minutes) in which he recorded, "Explained the current position and what happens if win or lose". Mr Watson said he was aware at the time of the conversation that fees of $130,000 were owed for preparation and for the trial.

35. Mr Watson said he was concerned and had a conversation with Mr Currie about the unpaid bills. He said the conversation went as follows:

AW "Rowan, we are owed $130,000. I need to get some money from you to reduce that".

RC "Tony, I need to get in the significant change compensation from Australian Unity in order to pay you. Be understanding and sympathetic of our position. Your bills will be paid from that money as soon as I get it".

AW "I accept that position".

36. Mr Watson said that on the basis of these assurances from Mr Currie, Middletons continued to act, there were further discussions and, after the adverse decision in the proceeding, instructions were taken to file an appeal and to consider the possibility of further proceedings being issued.

37. Mr Travis Payne, a senior associate at Middletons, was assisting Mr Watson with the litigation. He occupied the room next to Mr Watson. He recalled being involved in the preparation of bills for $70,000 on 24 May and $60,000 a week later. He said that shortly after the second bill was rendered, Mr Watson spoke with him and expressed his surprise at how rapidly the fees had been generated. He told Mr Payne he would speak with Mr Currie to arrange for payment of the costs. A few days later, Mr Watson came into Mr Payne's room and told him that he had had a conversation with Mr Currie and had been told that the costs would be paid from the compensation. At that time, Mr Payne said he believed Mr Watson handed him a file note. He was asked to identify the file note. Mr Payne said he believed the file note was the document dated 5 June 2006.

38. Mr Watson referred to Mr Currie's promise to pay the legal costs from the significant change compensation in two later emails. First, an email to Mr Currie on 9 August 2006 when, after a dispute in relation to the payment of the fees had arisen, Mr Watson wrote saying, "This is not a case of you not having the money to pay our fees as you have received in excess of $600K already towards the significant change compensation payment from AU. Indeed, prior to that payment being received,

Rowan had expressly stated to me that he needed to get the money in so that he could pay our fees. Now that the money has been paid, we are entitled to payment". On 16 August 2006, Mr Watson sent a further email which read, in part, "The thing that hasn't been done is you have not paid us as you agreed you would and further you got me to continue going notwithstanding accounts were overdue on the representation that we would be paid from the significant change compensation when it was received. I do not shirk from insisting that you do what you agreed to do, namely pay us when you said you would".

39. Mr Currie said that no such conversation took place, either on 5 June 2006 or at all. The first request for payment of the outstanding moneys was when Middletons' credit manager rang in mid-July, after the Supreme Court judgment had been handed down and after the compensation money had been paid. Mr Currie's recollection of events was, however, not always accurate. For example, he was adamant in his evidence, that he had not been aware of the earlier accounts rendered in 2003, although later during his cross examination correspondence was produced which showed that he had queried those accounts.

40. In his final submissions, Mr Riordan submitted that two false statements had been made by Mr Currie on 5 June 2006. The first was that the legal costs had not been paid because the defendant could not afford to pay them without receiving the significant change compensation. In fact, as Mr Currie said in evidence, he had told the company bookkeeper to stockpile the accounts because he considered the $50,000 paid to that time was a sufficient sign of goodwill on the part of the Meridian companies. This matter was not, however, pleaded as the representation relied upon by the plaintiff.

41. The representation relied upon was that the accounts would be paid from the significant change compensation. I consider it likely that such a statement was made, or an understanding was reached between Mr Watson and Mr Currie, that this was what was to occur. Mr Watson expected that the compensation would be paid through Middletons and he said he was dismayed when he learnt that the payment

had been made directly by Australian Unity to Retail. In these circumstances, I am not persuaded that there was any reliance upon the representation or that further work carried out after any such understanding was reached was performed on the basis of the promise that the costs would be paid from the significant change compensation. It would have appeared to Mr Watson that the compensation monies would always be available and, before disbursing the balance to his client, he would be able to deduct the costs and disbursements.

42. I consider it unlikely that there was any such conversation or arrangement reached on about 5 June 2006. Middletons had already invoiced accounts totalling $54,485.84 which had been paid in accordance with the requested terms of 14 days. Further accounts for $70,573.77 dated 24 May 2006 and $60,878.14 on 31 May 2006 were issued. Neither would have been payable, in accordance with the terms of payment, by 5 June 2006. I consider it unlikely that a demand would have been made, at that time, in the terms Mr Watson expressed in his evidence. It is also unlikely that it would have been couched in those terms prior to the delivery of the unfavourable Court decision.

43. The emails dated 9 and 16 August 2006 suggest that a conversation occurred prior to the payment being received for the significant change compensation. However, it is impossible on the evidence for me to reach any conclusion as to when such a conversation might have been or the precise terms of the conversation, other than to generally conclude that at some time, probably prior to the receipt of the compensation payment in mid-July 2006, there was a conversation between Mr Watson and Mr Currie as a result of which Mr Watson believed that the outstanding accounts would be paid once the compensation was received by the firm. For these reasons, the plaintiff has not made out the claim based upon the alleged representations.

Appropriate relief

44. In view of the findings I have made, it would seem that the only appropriate order is to make a declaration that the first defendant, Meridian Financial Pty Ltd, retained the

plaintiff, Middletons (a firm) on about 2 August 2005 to act on its behalf and on behalf of any associated companies, including Meridian Retail Pty Ltd, in respect of a dispute which had arisen in relation to the franchise agreement entered into between Meridian Retail Pty Ltd and Australian Unity Retail Network Pty Ltd in about September 2003. I will hear further from the parties in relation to the form of the judgment and questions of legal costs.

Certificate

I certify that these 14 pages are a true copy of the reasons for decision of His Honour Judge Anderson delivered on 6 March 2007.

Dated: 6 March 2007.

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Clare Ashby

Associate to His Honour Judge Anderson