

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

<u>JUDGE:</u>	HIS HONOUR JUDGE ANDERSON
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	14, 16 & 19 February and 6 March 2007
<u>DATE OF JUDGMENT:</u>	4 April 2007
<u>CASE MAY BE CITED AS:</u>	Middletons v. Meridian Financial Pty Ltd & Anor
<u>MEDIUM NEUTRAL CITATION:</u>	[2007] VCC 394

REASONS FOR JUDGMENT

Catchwords: Costs - Plaintiff only partially successful - Litigation necessary to establish liability of first defendant - Order for costs made.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
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 On 6 March 2007, I delivered my reasons for judgment. The parties have prepared written submissions on the issue of the costs of the proceeding. The plaintiff's submissions are dated 21 and 29 March 2007, and the defendants' submissions are dated 22 and 27 March 2007.
- 2 The plaintiff has succeeded against the first defendant. As a consequence of my findings, there will be judgment for the plaintiff against the first defendant for 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 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.
- 3 The plaintiff has failed in its claims against the third defendant. Accordingly, there will be judgment for the third defendant against the plaintiff. The plaintiff concedes that in these circumstances the third defendant should receive an order for costs to be taxed on Scale D on a party/party basis. The third defendant submits that the costs should be taxed on a solicitor/client basis because the third defendant *"was included in the claim simply as an aggressive tactic attempting to put pressure on the third defendant"*.
- 4 In my view, there is no basis for this submission or for displacing the ordinary rule that costs should be ordered on a party/party basis. As the third defendant was not separately represented, the costs will be limited to any additional costs incurred as a result of the defence of the proceeding against that defendant.
- 5 The plaintiff had only limited success against the first defendant. It was successful in establishing that the first defendant had retained the plaintiff but failed in its assertion that the first defendant had entered into a costs agreement or that actionable representations had been made through the third defendant. The first defendant

asserts that, *"Clearly, the correspondence between the parties shows that all the plaintiff had to do was to agree to have its bills of costs assessed in accordance with the appropriate scale and the first defendant would have been content to remain liable for those bills"*. I cannot accept that submission.

6 On 16 November 2006, Master Daly, in the Supreme Court of Victoria, determined an application by Meridian Financial Pty Ltd for the assessment of two of Middletons' bills of costs. The application was dismissed. The Master said that, *"Making an order for an assessment will only be of any practical utility if it is accepted that Meridian Financial is liable to pay and there is no valid costs agreement. That position is not asserted or accepted by either of the parties to this application"*.

7 The proceeding in this Court against the first defendant was necessary to establish the plaintiff's entitlement to costs against the first defendant and the basis of that entitlement. On balance, I am persuaded that the plaintiff should therefore receive an order for the costs of the proceeding against the first defendant.

8 The plaintiff seeks certificates for two counsel and for counsel's fees to be paid as a daily fee. It was submitted that, *"The factual matrix before the Court in this matter was somewhat unusual and required detailed appreciation of both the general law and the statutory regime"*. I do not accept this submission, and further, I consider that by reason of the level of success the plaintiff has had in the proceeding against the first defendant, it would not be appropriate to certify for two counsel or for fees above scale.

9 The orders I propose to make are as follows:

Judgment for the plaintiff against the first defendant in the terms I have set out above, together with a further order that the plaintiff's costs be taxed on Scale D and, when taxed, be paid by the first defendant. I certify for the appropriate number of refreshers, two briefs to hear judgment and the preparation, service and filing of the plaintiff's court book.

Judgment for the third defendant against the plaintiff, together with a further order that the third defendant's costs, limited to any additional costs incurred on his behalf in defending the proceeding against him, to be taxed on Scale D and, when taxed, to be paid by the plaintiff.

Certificate

I certify that these 3 pages are a true copy of the reasons for decision of His Honour Judge Anderson delivered on 4 April 2007.

Dated: 4 April 2007.

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Clare Ashby
Associate to His Honour Judge Anderson