

BETWEEN

ABJ Ltd

FIRST APPLICANT

ABK

SECOND APPLICANT

AND

ZYT Ltd

RESPONDENT

Date of Order:

21 August 2012

Referee:

Referee Haronga

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that the Applicants' claim is to be dismissed.

Facts

[1] CB, a director of the Applicant, ABJ Ltd, was also a director of the company NV Ltd. On 24 February 2011, NV Ltd entered into a Sale and Purchase Agreement for the sale of a gym business to ZM. Present at the sale negotiations on that day were LO and her husband ABK, and ZM and her husband BN, who is a director of the Respondent. At their meeting BN offered to provide accounting services for both applicants free for two years. On 2 May, ABK emailed BN asking if his offer still stood and BN replied on 5 May that it did. Arrangements were then made to start the process of the Applicants' files being transferred over from their previous accountant. Around July, a dispute arose between CB and ZM over retention of an amount of the purchase price and this dispute is being resolved separately by private arbitration. On 1 December, the Respondent advised ABK that it would not be taking the Applicants on as clients. On 27 April 2012, the Applicants advised the Respondent that their agreement that the Respondent provide two years' accounting services was cancelled. The Applicants now claim \$13,943.50 for two years' accounting fees.

Law

[2] The relevant law is the law of contract and the provisions for repudiation and cancellation under the Contractual Remedies Act 1979. While the Applicants have referred to the Property Relationships Act 1976, I do not consider that the provisions of this Act apply in this matter as there is no dispute over any relationship property. The Respondent has referred to s 9 of the Property Law Act 2007; however, I do not consider that this is relevant in this matter as there is no deed. The Respondent has further cited a number of cases relating to consideration and gratuitous promises, and I have considered these in making this decision.

Issues

[3] The issues to be determined are:

- (i) Was there an agreement that the Respondent would provide the Applicants with free accounting services for two years?
- (ii) If so, was this part of the Sale and Purchase agreement or a separate agreement?
- (iii) Has the agreement been breached by either party?
- (iv) Have the applicants suffered loss as a result?
- (v) Are the applicants entitled to claim \$13,943.50?

Decision

[4] Firstly, I find that there was an agreement reached in May 2011 between the parties that the Respondent would provide accounting services free for two years for the Applicants.

[5] Secondly, I find that it is more probable than not that this agreement was not part of the Sale and Purchase Agreement signed on 24 February 2011.

[6] Further, I find that the agreement reached in May 2011 was not a legal binding contract between the parties as there was no consideration and it is therefore not enforceable.

[7] The Applicants are therefore not contractually entitled to any compensation from the Respondent.

[8] The Applicants say that the agreement for the Respondent to provide them with two years' accounting services for free was a side agreement, which formed part of the consideration for the Sale and Purchase Agreement. They say that it added value to the final price and provided a sweetener for them to agree on that price, and that they signed the Sale and Purchase Agreement on that basis. The Respondent, on the other hand, says it made the offer to provide the accounting services after the Sale and Purchase Agreement was signed and that it was a gratuitous offer made as a goodwill gesture with no consideration for the services being offered.

[9] The Applicants have to prove their claim on the balance of probabilities. Weighing up all the evidence on this issue, I am not satisfied that the Applicants have proved that it is more probable than not that the Respondent's offer to provide accounting services was part of the Sale and Purchase Agreement.

[10] While the Applicants, along with statements from CB's parents, say that the Respondent made its offer during the process negotiations as a sweetener for CB to agree to a price offered by ZM, the Respondent and ZM say the offer was made informally over drinks after the Sale and Purchase Agreement was signed. With such conflicting evidence from those present at the meeting on 24 February, the Applicants have to prove that their version of events more probably occurred at the meeting rather than the Respondent's version. On the evidence available, I am not persuaded that they have done so.

[11] I note that there is no mention of such a side agreement in the Sale and Purchase Agreement or in any other written form of a term, which the Applicants say was a crucial issue related to the final sale price they agreed to. I note that ZBK is a lawyer and was closely involved at their meeting in vetting the wording of the Agreement and would be expected to be more aware than the average person of the need to documenting any key terms of a contract.

[12] I have also considered the email that ZBK sent to the Respondent on 2 May in which he says:

Sorry to bother you but I would be grateful, if your offer still stands, if you or your staff member could have a second look at my draft accounts and tax appraisal by my current accountant.

[13] In my view, this indicates that he did not consider then that he had already accepted the Respondent's offer. It also does not support his view that they had a side agreement as part of the Sale and Purchase Agreement or he would not be expected to be asking the Respondent some two months later, if the offer still stands.

[14] I accept that when the Respondent replied on 5 May its offer still stood, and the parties then had an agreement about the Respondent taking over as the Applicants' accountant. However, I am not satisfied that this agreement is a legal binding contract as there was no consideration involved. For an agreement to be legal and binding there must be consideration. Consideration is the price of a promise or, in other words, the promise offered by one party and accepted by the other as the price of that other's promise. In this instance, the Respondent made its offer or promise to the Applicants to do their accounts for free with no corresponding price or obligation sought on the part of the Applicants in return. I note that the Respondent says it made the offer as a gesture of goodwill to the Applicants after they had concluded the sale of the gym to ZM. This indicates to me that the offer was in the nature of a gratuitous offer.

[15] As this agreement was not legal and binding and unenforceable, the Respondent was entitled to later withdraw its offer and not be obligated to perform the services offered. The provisions under the Contractual Remedies Act for repudiation by the Respondent and cancellation by the Applicants therefore no longer apply.

[16] Therefore, the Applicants' claim for damages, being the cost of two years' accounting services, cannot be successful and nothing is to be payable regarding their claim.