

**BETWEEN**

**AFC**

**APPLICANT**

**AND**

**ZUT**

**RESPONDENT**

Date of Order:

5 July 2013

Referee:

Referee Perfect

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**ORDER OF THE DISPUTES TRIBUNAL**

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**The Tribunal hereby orders that that the claim is dismissed.**

## **Facts**

[1] AFC and ZUT were involved in two family businesses (owned by two companies of which their wives were directors): one in the city and one in an [Auckland suburb]. The city business did not fare well and it was decided to close it down in August 2011.

[2] AFC planned to pull out of the suburban business and says that ZUT agreed to pay him \$36,000.00 (a return of some of the money he says he invested in it). ZUT made three payments to AFC (on 10, 17 and 23 August 2011), totalling \$18,000.00. This was apparently an arrangement between the two men personally, the companies were not involved. There was no written record of the agreement.

[3] AFC says that ZUT promised to pay the remaining \$18,000.00 in September 2011 but did not. ZUT denies agreeing to pay any more than the \$18,000.00 already paid.

## **Issues**

[4] The scope of this decision does not extend to the reasons that one or both businesses failed even though this is clearly a major issue of contention between the two men. The claim relates to an alleged agreement and the decision can only focus on whether or not an agreement existed and, if so, what the terms of the agreement were.

## **Decision**

*Was an agreement made between AFC and ZUT to repay part of AFC's personal investment in the suburban business?*

[5] I find that there was an agreement, as evidenced by the fact that \$18,000.00 was paid in August 2011. However, I find that there is insufficient evidence to prove that AFC is owed a further \$18,000.00 by ZUT.

[6] The absence of a written agreement is a major evidential issue for AFC. There is also no business valuation as at August 2011, which might lend support to one or other of the party's positions. There is written reference in a text from AFC to ZUT to the balance of the money owed but no acceptance of this by ZUT.

[7] ZUT's position in 2012 as laid out in solicitors' correspondence was that any agreement made about the suburban business was subject to a second agreement about the city business, which he regards AFC as having breached. AFC sees this as an admission by ZUT that he did agree to further payment for the suburban business, but in 2012 was seeking to offset that against losses from the city business for which he held AFC responsible. I cannot read that much into that correspondence – it does not say that ZUT agreed to further payment for the suburban business, let alone mention an amount.

[8] AFC has also produced written witness statements from various other people as to the existence and nature of the agreement between him and ZUT. Only two of these people say that they heard ZUT talk about the agreement (as opposed to AFC alone) and we adjourned to hear from these two people in person, one in the hearing room and one via teleconference [overseas].

[9] VB gave evidence as a witness via teleconference from [overseas]. From 2004–2012, he had been a banking advisor in Auckland and knew AFC, and later ZUT, in this capacity. He told the hearing that both men visited him at the bank in 2011 and told him that ZUT was planning to take over the suburban business for around \$40,000.00, half of that amount already having been paid to AFC. VB told him that they could not give a loan to repay a loan. ZUT strongly refuted having discussed payment to AFC at the bank or in front of VB at all, saying that at some point around that time he had attempted to get a loan for the city store. He challenged VB's independence – VB volunteered that he had got to know AFC in 2006 when he used to get petrol from his service station, and that he had also taught AFC's son karate while in Auckland. He got to know ZUT in about 2010 and ZUT's family also became bank customers.

[10] The fact that VB may have had some degree of relationship with AFC's family for longer or to a greater extent than with ZUT's, does not necessarily mean that his independence as a witness is compromised, given that his primary relationship with both men was as a banking advisor. However, the extent of his knowledge of the nature any agreement is limited and I cannot be satisfied that from what he heard (which ZUT denies saying), he has the full story and context of any agreement/s reached. Given the time that has passed, I also cannot be satisfied that VB's memory has not been influenced by AFC's strong views as to the nature of the agreement.

[11] I have similar concerns about the evidence of the other witness, OP, in terms of both independence and recall. While I do not doubt that both witnesses are putting forward their genuine recall in good faith, for me to rely solely on their recall of brief and/or passing mentions of an agreement after two years have passed and in the absence of any written records at the time, is problematic. It would also be failing to take into account the wider context of this dispute because, there is at least a suggestion, in the solicitors' correspondence in 2012, that there was more than one agreement about the families' business affairs around the same time in 2011 and the inter-relationship of those agreements is unknown.

[12] There is not enough tangible and reliable evidence as to what the terms of the agreement/s made between AFC and ZUT in mid-2011 were, to prove that ZUT owes a further \$18,000.00 as claimed, and the claim must therefore be dismissed.