



[5] The effect of the Contracts (Privity) Act 1982 is to provide for the enforcement of promises contained in contracts for the benefit of third parties. This is precisely the situation that Mr Goodall is in; he is not a party to the agreement for sale and purchase but the provision conferring employment upon him is a benefit for him which, in terms of the law, he may now seek to enforce.

[6] Despite the explicit words in clause 21.1 of the agreement for sale and purchase, there is no employment agreement set out in the sale and purchase agreement. The provision I have just referred to alludes to the terms of the employment being attached to the sale and purchase agreement as a schedule, but the relevant schedule is blank.

[7] Mr Goodall's evidence is that on and from 1 December 2007, he commenced acting in the position of manager residential real estate sales (in accordance with the explicit terms of the sale and purchase agreement), although there was no written employment agreement in place.

[8] Mr Goodall says that there had been oral discussions between himself and Mr Harwood, the chief executive of Simes, and that between them, there was an understanding about the terms and conditions of the employment, at least sufficient to enable Mr Goodall to commence his duties. In particular, there was an agreement in respect of remuneration, although no remuneration was actually paid.

[9] The evidence is that on 7 December 2007, there was a discussion between Mr Harwood and Mr Goodall. Mr Harwood's evidence is that the purpose of the discussion was to *discuss his* [Mr Goodall's] *impending employment*. Certainly, the meeting was a planned one; both protagonists agree that was the position, but Mr Goodall is not explicit that the purpose of the meeting was to discuss his employment. That is not surprising as Mr Goodall contended that the terms and conditions of the employment were already agreed in principle and, far from being an *impending employment*, he says he had already started work.

[10] In any event, it is common ground that at this meeting before there was any opportunity to discuss matters such as any employment agreement, Mr Goodall disclosed that he had made an error (of significant proportions) in the disclosing of material information to Mr Harwood in relation to the financial performance of Edge.

[11] There is dispute between the principal protagonists about how much reliance Mr Harwood could or would have placed on the subject information, but for present purposes it is enough to say that the disclosure Mr Goodall made at that meeting was highly material in terms of any evaluation of the financial performance of Edge. In effect, what Mr Goodall was disclosing was that the error he had made created a difference in the financial performance of Edge from being a successful trading entity over the previous six months to being a loss making entity over that same period. Plainly, if Mr Harwood had relied to any extent on this material, then issues about misrepresentation would come to the forefront.

[12] Both of the protagonists agree that Mr Goodall undertook to obtain accurate figures from his accountants in respect of the subject period which in fact was the period after 31 March 2007. However, there is dispute about the other outcomes of the meeting. For his part, Mr Harwood contends that after making his revelation about the misrepresentation, Mr Goodall then said words to the effect that he understood there would be no position in the organisation for him, if that was what Mr Harwood wanted.

[13] Mr Harwood said in his evidence that he accepted Mr Goodall's view and indicated that he had no trust and confidence in Mr Goodall now that this revelation had been made.

[14] Conversely, Mr Goodall was equally clear that there was no termination of the employment relationship at the 7 December meeting. For instance, he says in his brief of evidence:

*Following our meeting on 7 December I continued to carry out my role. There was never any suggestion that I had not been, or was not employed.*

[15] In the period from 17 December down to 21 December, there were a series of meetings (three in number) between the principal protagonists. According to Mr Harwood, each of these meetings was focused on the commercial arrangement between the parties and the various endeavours being made to, amongst other things, fix a new purchase price, given the alleged misrepresentation on which the original purchase price had been based.

[16] While Mr Goodall does not deny that the thrust of those three meetings was concerned with the commercial realities, Mr Goodall contends that at the meeting on

21 December 2007 (the last of them), he was effectively dismissed from his employment by Mr Harwood. Mr Harwood flatly denies that that happened at all because he says there was a settled understanding between the two men dating from the meeting of 7 December 2007 that the employment relationship had already been brought to an end, if indeed it had ever been started.

[17] Mr Goodall contends that, during a telephone discussion with Mr Harwood on 4 January 2008, Mr Harwood indicated to Mr Goodall that he may have been hasty in terminating Mr Goodall's employment and he requested further time to consider the position. For his part, Mr Harwood acknowledges he may have spoken with Mr Goodall on 4 January 2008, but denies absolutely Mr Goodall's version of events.

[18] Mr Goodall relies on an email which Mr Harwood sent on 10 January 2008 which indicated that Mr Goodall was remaining on annual leave but Mr Harwood says that the email is absolutely consistent with his evidence.

[19] There was a further meeting between the parties on 14 January 2008, at which Mr Goodall claims that Mr Harwood confirmed the decision to dismiss him and told him he no longer had employment. As on the previous occasions that I have already alluded to, Mr Harwood flatly denies any such discussion taking place, although he accepts that the meeting itself took place and again says that it was for the purpose of discussing the commercial arrangements between the parties.

[20] A personal grievance was raised on 18 March 2008, that is some two months after the last face-to-face exchange between the parties, and it seems common ground that Mr Goodall had taken no earlier steps to seek recovery of the unpaid wages which he claimed were due and owing to him.

### **Issues**

[21] It will be convenient for the Authority to examine the following questions:

- (a) Was there ever an employment relationship between the parties;
- (b) If there was, what were its terms, and when did it start and finish; and
- (c) Does Mr Goodall have a personal grievance in consequence?

**Was there an employment relationship?**

[22] I am satisfied on the balance of probabilities that there was an employment relationship between the parties.

[23] I reach this conclusion first of all because of the explicit provision in clause 21 of the Agreement for Sale and Purchase between Simes and Edge. That provision, which I have already referred to earlier in the determination, is in explicit terms and it seems to me that it clearly evidences the intention of the contracting parties to create a legal employment relationship.

[24] Furthermore, the explicit terms of clause 21 make clear that the clause has been inserted for the benefit of Mr Goodall and is enforceable by him in terms of s.4 of the Contracts (Privity) Act 1982. That provision has no meaning, in my view, unless it intends that the contracting parties' decision is available to Mr Goodall himself to be relied upon.

[25] There is, I think, an intention to create legal relations by the effect of that clause together with an offer of employment from Simes to Mr Goodall. By Mr Goodall's action in attending at the workplace and undertaking duties, he is seen to have accepted the offer so made.

[26] To add to the picture, there was significant public commentary originating from Simes which held out Mr Goodall as a person who was joining the management team of the enlarged enterprise. There was public disclosure of that fact in the newspaper and a variety of internal opportunities within the business to emphasise Mr Goodall's new role.

[27] Further Mr Goodall was given tools to deliver services within that new role such as business cards and access to the Simes in-house computer network.

[28] Even Mr Harwood, the Chief Executive of Simes, acknowledged that Mr Goodall had *some involvement* at the Papanui branch. Mr Goodall's own evidence goes further and he details the nature and extent of the work that he performed.

[29] It is only in respect to issues of remuneration and duties that Simes rely upon to argue there was no concluded bargain. Simes point out there was no written

agreement and contend that there was never a bargain concluded because there was no agreement about remuneration, or indeed about the extent of Mr Goodall's duties.

[30] In relation to remuneration, there was a conflict in the evidence. Mr Goodall says that there were discussions between himself and Mr Harwood at which remuneration was settled. Specifically, Mr Goodall contends that he accepted a verbal proposal from Mr Harwood, the effect of which was that he would be paid a salary of \$80,000 per annum and would have access to a bonus scheme which could net him up to another \$60,000 per annum. Mr Goodall's evidence (which on this point anyway was not contested by Mr Harwood) was that Mr Harwood indicated that that was the remuneration package for other senior managers at Simes.

[31] Mr Harwood maintains his position that there was never an agreement about remuneration and that all they did together was talk about the way in which other senior managers at Simes were remunerated.

[32] In relation to duties, it seems clear that on the first full working day after the settlement of the purchase, Mr Goodall sent an email to Mr Harwood proposing a meeting which was to include *a general discussion on the running of the residential division*.

[33] I think it more, rather than less, likely that the parties had a settled understanding of Mr Goodall's remuneration but it is clear that there was no agreement about duties.

[34] Notwithstanding that, I am satisfied that the law allows me to conclude that there was an intention by both parties to be bound, from the factual matrix before me: see for instance *Barker v. Armourguard Security Ltd* [1998] 1 ERNZ 424.

[35] Finally, I need to comment on Simes' contention that Mr Goodall cannot have expected payment for his services because he did not seek payment until fully two months after the relationship ended. I asked Mr Goodall about this contention during the investigation meeting. In essence he told me that he was more concerned and focused on settling the dispute around the purchase price for Edge than he was about his own remuneration. In the circumstances, I think that is a reasonable response to the contention made by Simes, particularly when Mr Goodall also indicated to me his understanding that he would be paid monthly.

**What are the terms of the employment agreement?**

[36] I am satisfied that the evidence discloses that Mr Goodall was to be employed as Manager Residential Sales, that he was to be based at the Papanui branch of the new amalgamated entity and that he was to have responsibility for all of the residential sales people in the amalgamated business.

[37] His remuneration I hold was agreed at an \$80,000 salary together with access to the same kind of bonus arrangement that the other senior management in Simes had, which could potentially net him another \$60,000 per annum as additional income.

[38] I do not consider that the duties of the role had been discussed and agreed (because other events rather overtook that discussion).

[39] However, it seems to me clear from the evidence that Mr Goodall commenced his duties immediately after settlement of the Agreement for Sale and Purchase and continued to fulfil the kinds of responsibilities that would be expected of a person in the sort of role that he was engaged for, despite there being no explicit agreement as to duties.

[40] I think the evidence is clear that Mr Goodall commenced his responsibilities immediately on settlement and amongst other things, this conclusion is supported by Mr Goodall's email to Mr Harwood early on the first business day immediately after the settlement of the transaction.

[41] Mr Goodall's evidence (which at this point I accept) was that he commenced working his way through the sales people who would be reporting to him, talking with them about targets met and to be achieved.

[42] It seems to be unchallengeable that Mr Goodall worked in the role until 7 December. Once that date is reached, I must decide whether to prefer Mr Harwood's recollection of the events of that day or Mr Goodall's. In essence, Mr Harwood says that, if there were an employment relationship, it was terminated by agreement on 7 December. Conversely, Mr Goodall says that the 7 December meeting did not address his employment at all and that that discussion happened later.

[43] There is no doubt that the meeting between the principal protagonists did take place on 7 December 2007. Equally, it is common ground that Mr Goodall revealed to Mr Harwood at this meeting that he had misrepresented the figures that he supplied on the performance of the Edge business. Mr Goodall says the misrepresentation was innocent

[44] Mr Harwood thinks the misrepresentation was deliberate and that Mr Goodall knew or ought to have known that the figures that he prepared showing a profit for the previous six months trading of the Edge business were simply unbelievable because Mr Goodall would have known that the business in fact was making a loss.

[45] Mr Goodall says that having made the revelation about the misrepresentation, he simply undertook to obtain the correct figures from his chartered accountants and these accounts became available on 12 December 2007.

[46] So it can be said that despite significant common ground about the meeting the key question remains whether there was a termination of the employment relationship or not. Mr Harwood says that Mr Goodall effectively indicated that he would understand if Mr Harwood had lost trust and confidence in him and that in the result, there was a settled understanding between the two men that Mr Goodall would not remain in the employment.

[47] Conversely, if I am to prefer Mr Goodall's recollection of the events of that meeting, then all that transpired according to Mr Goodall was his revelation that he had misrepresented the business figures and his commitment to obtain his accountant's proper business figures for the same period.

[48] Given my earlier finding that there was an employment relationship created, it follows that if I am to prefer Mr Harwood's evidence that employment relationship lasted one week in total from 1 December 2007 down to 7 December 2007.

[49] On balance, I prefer Mr Harwood's recollection. I do that principally because it seems to me inconceivable that there would not be some response from each party to such a significant revelation (that is the revelation that Mr Goodall had misrepresented the financial position of his firm).

[50] On Mr Harwood's recollection of the events of the meeting, Mr Goodall indicated that he would understand if Mr Harwood had lost trust and confidence in

him and Mr Harwood himself confirmed that in the circumstances he had lost trust and confidence and so the parties left the meeting, according to Mr Harwood, with a settled view that there was no continuing employment relationship.

[51] It seems to me incredible that, if one takes Mr Goodall's recollection of these events, an employment relationship would simply continue without more in circumstances where a fundamental and material misrepresentation had been disclosed by one party to the other. Not only would I expect that Mr Harwood would respond negatively to that intelligence (as he himself says he did) but also I would expect that Mr Goodall would have offered some olive branch, which again Mr Harwood says he did.

[52] Mr Goodall wants me to accept that the decision to purchase was made before the figures containing the misrepresentation were provided to Simes. However, I prefer Simes' evidence on this point. Mr Harwood told me that the only hard copy accounts he had prior to 12 December 2007 were the accounts provided to him on 4 October 2007 giving trading results for the three years 2005, 2006 and 2007. In other words, Mr Harwood was telling me that he had no hard copy information about the performance of the Edge business from the period 1 April 2007 onwards, and he further deposed (and I accept as truthful) that for that period he relied on the verbal representations made by Mr Goodall.

[53] While it may be true that Mr Goodall did not provide the material which contained the significant misrepresentation until after the Agreement for Sale and Purchase had been entered into, Mr Harwood's evidence is that he was reliant on Mr Goodall's verbal representations as to the financial performance of edge for the period the parties were in negotiation.

[54] Mr Harwood made the observation that the figures provided by Mr Goodall and the misrepresentation in them showed that the business had made a profit for the six months from 1 April 2007, but in fact Mr Goodall would have known, as a prudent businessman, that the business in fact had made a loss over that period.

[55] Accordingly, my considered view is that Mr Harwood relied on Mr Goodall's representations as to the financial performance of the Edge business in order to make the decision to purchase. Whether the particular misrepresentation referred to in this determination is material or not seems to me neither here nor there. I am satisfied that

the only hard copy information which Mr Harwood had was the material which he received on 4 October 2007 and that material is only for the trading period up to 31 March 2007. It follows that for the period after that date, Mr Harwood had nothing to make his decisions on except what Mr Goodall told him and I am satisfied on the balance of probabilities that the information Mr Goodall provided to Mr Harwood did not give the latter a fair and full picture of the nature of the financial performance of the business being purchased.

[56] That being my considered view, it follows that it seems to me highly unlikely that, once Mr Goodall made his revelation about a significant individual misrepresentation, that the parties would not have had the sort of discussion which Mr Harwood recalls, namely a discussion where they agree that in all the circumstances, there should be no continuing employment relationship.

**Does Mr Goodall have a personal grievance then?**

[57] I have already made findings that there is an employment relationship discernible from 1 December 2007 to 7 December 2007. In principle then, that creates an environment where the Authority has jurisdiction to deal with any employment relationship problem that emerges.

[58] However, by virtue of the factual findings I have already made, I have no doubt that the employment relationship came to an end on 7 December 2007. Equally clearly, the personal grievance was first raised on 18 March 2008 which is outside the 90 day time limit required by s.114 of the Act.

[59] It follows that Mr Goodall requires either the consent of Simes to raise the matter out of time (which is denied) or, in the alternative, he must apply to the Authority under s.114(3) of the Act, which he has not done.

[60] In those circumstances, I am unable to take the alleged personal grievance any further.

[61] However, for the sake of completeness, I note that I have found as a fact that Mr Goodall worked for Simes from 1 December 2007 to 7 December 2007 and accordingly, I hold that he is entitled to salary for that one week period at the rate of \$80,000 per annum. There is no basis on which I can direct payment of any

additional sum by way of bonus or the like; I have simply not heard evidence which would enable me to make any judgment in that regard.

[62] The question of notice arises. There is no evidence before me on which I can base any conclusion. Mr Goodall had an expectation that he would be paid monthly but as he was never paid by Simes, it is difficult to rely on that evidence as conclusive. Having accepted that the employment relationship ended by agreement on 7 December 2007, I think the fair approach is to require Simes to pay Mr Goodall a second weeks' salary, at the appropriate rate, in lieu of notice.

### **Determination**

[63] I am satisfied that Mr Goodall was employed by Simes from the date of settlement down to 7 December 2007 at which point I consider the employment relationship concluded by mutual agreement.

[64] It follows that Mr Goodall is entitled to be paid for the period of the employment and a like period of notice and I direct that that payment is to be made based on an annualised salary of \$80,000 per annum for the period in question. Simes is to pay Mr Goodall 2 weeks salary then, at the annualised rate of \$80,000.

[65] By virtue of my conclusion that Mr Goodall was in employment (albeit for a brief period) the Authority has jurisdiction to consider his personal grievance, but his personal grievance was not raised within the 90 day timeframe and he neither has the consent of Simes to bring it out of time nor has he applied to the Authority for the appropriate leave.

[66] In those circumstances, I am unable to take matters any further.

### **Costs**

[67] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority