

AUSTRALIA / JUDGMENT

## Macdonald v Benjafield [1999] NSWSC 677

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New South Wales

Supreme Court

CITATION : Macdonald v Benjafield [1999] NSWSC 677

CURRENT JURISDICTION : Common Law

FILE NUMBER(S) : 12921/98

HEARING DATE(S) : 7/6/99

JUDGMENT DATE :

6 July 1999

PARTIES : Neil Macdonald v Peter Benjafield & Anor

JUDGMENT OF : McInerney J at 1

LOWER COURT JURISDICTION : District Court

LOWER COURT FILE NUMBER(S) : 2787/89

LOWER COURT JUDICIAL OFFICER :

Mr T.J. Morahan. (Plaintiff)

COUNSEL : Mr V.R. Gray. (First Defendant)

Submitting appearance (Second Defendant)

SOLICITORS : A. R. Conolly & Company. (Plaintiff)

**Benjafield & Associates, Lawyers. (Defendant)**

CATCHWORDS : Contract/agreement for legal services. Insufficient consideration. Alleged negligent professional work. Solicitor. Determinations in costs assessments.

ACTS CITED : Legal Profession Act 1987.

CASES CITED : Curry v Misa (1875) 10 LR 10 at 153.

Carlill v Carbolic Smokeball Company (1892) 2 QBD 424.

DECISION : Dismissed with costs

THE SUPREME COURT

OF NEW SOUTH WALES

COMMON LAW DIVISION

Tuesday, 6 July 1999

McINERNEY AJ

12921/1998: NEIL MACDONALD v-PETER BENJAFIELD & ANOR.

## J U D G M E N T

1\_\_\_ HIS HONOUR: In this matter the Plaintiff, Neil MacDonald seeks the following orders against the Defendants.

2\_\_\_ 1) A declaration that the Plaintiff is not liable to pay the fees of the Defendants incurred in the course of acting for the Plaintiff in District Court proceedings at Sydney No. 2787 of 1989.

2) An order that the Determinations as to Costs made by Mr. Leonard Hattersley, Costs Assessor, on 30 October 1998 in Applications for Assessment of Costs Nos. 14392 of 1995 and 14393 of 1995, be set aside.

3\_\_\_ The Plaintiff relies on two affidavits in support of the relief sought, namely an affidavit by Mr. Alan Robert Connolly, sworn on 1 st February 1999, and an affidavit of Christopher Gordon Price, an employed solicitor of Mr. Connolly, dated 1 st February 1999. The Defendants have not filed any affidavits in reply.

4\_\_\_ This matter has a long history. The Plaintiff was a litigant in the District Court when he and his mother, Doreen MacDonald were sued by Elizabeth Aleksanian. The Defendants then practising as Benjafields Coral and Shanahan were his solicitors and Mr. Alan Connolly was acting for Mrs. MacDonald.

5\_\_\_ Mrs. Aleksanian was a client of M. A. MacDonald & Co, an accountancy firm, she sued the Plaintiff and the Plaintiff's Mother, Doreen MacDonald, who, I understand, was the proprietor of the firm, and the Plaintiff was the consultant to the firm. The cause of action was alleged negligent professional advice given to Mrs. Aleksanian by the Plaintiff.

6\_\_\_ The Plaintiff in these proceedings issued a Third Party Notice to C.E. Heath, Underwriting and Insurance (Australia) Ltd (C.E. Heath) seeking indemnity against his liability to Elizabeth Aleksanian under a policy of accountants professional indemnity insurance which indemnity at that point of time had been refused by C.E. Heath. From the correspondence annexed to the Plaintiff's affidavit it appears the policy was in the name of Mrs. MacDonald. The proceedings by Mrs. Aleksanian were settled on 20 th April 1994, the second day of the Hearing in the District Court by both the Plaintiff and Mrs. MacDonald. The Third Party proceedings were then stood over until 28 th September 1994. It was some time later that Mr. Connolly at the request of the

Plaintiff rang Mr. Peter Benjafield and arranged a meeting to discuss the Defendant's cost bills which had already been rendered for work performed up to that time.

7\_\_\_ It appears on 13 th September 1994 together with Mr. Price, an employed solicitor of Mr. Connolly, Mr. Connolly attended the offices of the Defendants at Chatswood and there conferred with Mr. Peter Benjafield, the first named Defendant. Mr. Connolly then informed Mr. Benjafield that the Plaintiff was in serious financial difficulties and was finding it extremely difficult to pay the Defendants fees and then said:

"And is not sure he can afford to keep instructing you"

8\_\_\_ Mr. Connolly then went on to state that if the Plaintiff lost his claim against Heaths he wanted the Defendants to forgo their fees already incurred,(see paragraph 8). On the face of it, this was a startling request.

9\_\_\_ On examining that paragraph and other correspondence annexed to the affidavit of Mr. Connolly, it appeared to me that the suggested agreement about fees related to the payment of fees in respect to the Third Party action, not the whole of the fees that had been incurred. That is I say, is further highlighted by correspondence annexed to Mr. Connolly's affidavit, for example the Defendants letter to Mr. Connolly, annexure F to the affidavit in which that very matter was alleged. The writer concluded his remarks by the following terms:

"To suggest anything else as you have done is ludicrous and insulting, remembering it was only at your request that we acted for Mr. MacDonald."

(See also annexure F to Mr. Connolly's affidavit.)

10\_\_\_ It appears initially Mr. Connolly was acting for both parties and when it became apparent it may have been a conflict of interest he asked the Defendants to act on behalf of the Plaintiff. I am satisfied on the material before me, annexed to the affidavit of Mr. Connolly, that he kept a very close interest in the proceedings, this in particular appears from the statutory declaration sworn in the cost assessment of Mr. Antoneas, page 100 of the annexures.

11\_\_\_ In the light of that matter I then sought from Mr. Gray of Counsel representing the Defendants in the presence of Counsel for the Plaintiff in my chambers for a clarification of that question. Mr. Gray said it was always understood that the agreement in question related not only to the fees likely to be incurred in the future in respect to the Third Party proceedings but to all fees incurred in the action. Whilst that concession was made it does not appear to be supported by the attitude of the Defendants up to and including the assessment of costs in this matter. In these circumstances, however, I proceed to consider the matter on that basis.

12\_\_\_ Mr. Benjafield indicated to Mr. Connolly he was not handling the matter as Mr. David Milne his partner was looking after the matter and he was overseas. He said in Mr. Milne's absence the matter was being handled by Mr. Antoneas and he had left the Defendants employ.

13\_\_\_ Mr. Connolly then alleged he put the facts of the case against Heath to Mr. Benjafield and stated in his opinion that C.E. Heath would be unable to deny liability, see paragraph 9, Mr. Benjafield, apparently was not so enthusiastic as in paragraph 11 said:

"I don't think I would agree with your view that Neil MacDonald's prospects are so good."

14\_\_\_ Mr. Connolly then went on the attack and stated that he was unhappy with the quality of legal service provided to Neil MacDonald by the Defendants since a Mr. Colin Mitty had left the firm. Since that time he alleged he had been dealt with unsatisfactorily and the costs charged were said to be considerably excessive, Mr. Benjafield said that he did not know about that, but Mr. Connolly went on to state that the Plaintiff believed there was a lot of wasted time, that they were not happy with Mr. Antoneas command of issues and the Plaintiff was concerned that he Mr. Antoneas was not clear as to the Plaintiff's case against Heaths, Mr. Connolly then said:

"These issues may in due course have to be fended, if there is not some agreement put in place between you and me."

If there was an agreement, it might include Neil abandoning any complaint putting in issue the professional competence of your firm or the quantum of the costs you have charged him. In exchange for Neil abandoning possible claims of professional incompetence and overcharging there should be an agreement that Benjafields would demand the costs only in the event Neil MacDonald is successful in his claim against the insurer and in that events he is not successful there should be no fee, Neil cannot afford your fees if he loses he can only keep instructing you if you agree he won't have to pay your fees if he loses. Neil will also have an appeal from the judgment if he loses."

( See paragraph 10.)

15\_\_\_ Mr. Benjafield in reply said he was concerned about the payment of Counsels fees whereupon Mr. Connolly gave an undertaking that Counsels fees would be paid regardless of the outcome of the case, he then went on to say:

" When we're talking about your fees we're talking about the bills you have already sent Neil that he has yet to pay as well as the fees you'll incur from now on until the Hearing. If you continue acting for Neil we will act as your Agents to prepare the matter for the Hearing and instruct Counsel."

16\_\_\_ Mr. Benjafield replied that although David Milne was overseas he could make a decision on this, (see paragraph 11), he then said:

"I'll go along with what you propose, we will be prepared to abandon our costs if Neil MacDonald is unsuccessful in his claim against your insurance company."

17\_\_\_ As part of the agreement Mr. Benjafield sought an undertaking that if there was an appeal in the event of the Plaintiff being unsuccessful in the Third Party claim.

18\_\_\_ Mr. Connolly confirmed the agreement by letter to the Defendants, December 1994, annexure A to his affidavit. Mr. Benjafield replied in which he confirmed "most of the details set out in annexure B".

19\_\_\_ On the 21 st September Mr. Benjafield said that he would stick to the agreement in the letter but only be happy if Doreen and Neil MacDonald were on the brink of financial collapse and he sought from Mr. Connolly a statement as to the assets and liabilities of the Plaintiff and his Mother, ( see paragraph 16 of Mr. Connolly's affidavit). Mr. Connolly informed Mr. Benjafield that he was instructed by the Plaintiff and his Mother that their liabilities exceeded their assets.

20\_\_\_ Mr. Connolly then informed Mr. Benjafield: " that Neil also confirmed today that he would accept your fees only if you risked them against the results of the case," Mr. Benjafield said "well, Alan will take the risk if you lose you will appeal", I do not understand quite what is meant by the phrase "he would except your fees."( See paragraph 18.)

21\_\_\_ Unfortunately for the Plaintiff on 20 th December 1994 Judge Garling of the District Court gave judgment in favour of C.E. Heath,(see paragraph 19 of Mr. Connolly's affidavit). Mr. Connolly then acted on behalf of the Plaintiff on an appeal to the Court of Appeal which was lost and he then sought special leave to the High Court which was refused.

22\_\_\_ A dispute then arose between the parties about the matter, the Defendants alleging they were not bound by the agreement negotiated with Mr. Connolly and Mr. Connolly asserting to the contrary. It not necessary to go through this large volume of correspondence as I was not referred to much of it by way of submissions by Counsel. There are some matters, however, that should be highlighted that show to me the unusual situation that has developed in this case. I have already referred to the assertions in annexure F to Mr. Connolly's affidavit.

23\_\_\_ In the ultimate as agreement could not be reached between the parties on the question of costs, the Defendants then instituted proceedings in the Local Court to recover the costs incurred before the Third Party Hearing took place, the matter was stood over generally to enable a bill of costs to be served and the costs to be assessed.

24\_\_\_ There were arguments on the quantum, the outstanding fees to 8 th August which was initially said to be in the sum of \$13,793.36, annexure C. It then appeared the claim by the Defendants at October 1995 was \$17,828.01. Mr. Connolly then put the Defendant on notice that he was objecting to the difference between the bills, he again set out at some length the alleged agreement between himself and Mr. Benjafield. Criticism was also made of Mr. Antoneas and his approach to the case. In a reply the Defendants (30 th October 1995), annexure L, Mr. Connolly's affidavit again denied Mr. Connolly's interpretation of the agreement. It was further pointed out by the writer, the Plaintiff had been made aware by Mr. Milne in August 1994 as to Mr. Milne's view as to costs, it was alleged the Plaintiff then sought to discontinue action against the insurer but at Mr. Connolly's behest he changed his mind and continued with the action. This is again further material to suggest that Mr. Connolly was keeping a very close eye on the litigation.

25\_\_\_ Eventually an application for assessment of costs was filed in the Registry on 9 th November 1995, the Cost Assessor, Mr. Hattersley then became involved and wrote on 19 th July 1996 to Connolly and Co. in which he sought information as to the state of the appeal as he regarded it as important because of the disputed terms between the parties that had been referred to, annexure S.

26\_\_\_ He also sought information on certain matters in particular:

- 1) "were those separate accounts or any of them disputed by your client". Mr. Connolly replied, annexure T, that his client did not dispute any of the separate accounts, it was then submitted that the cost question should await the outcome of the appeal which had not then been decided. In a letter of 4 th June 1997 Mr. Connolly informed the Defendants that the Court of Appeal on 9 th May 1997 dismissed the appeal, annexure C.C., were informed that Connollys' were making an application for leave to appeal to the Hight Court. That application was refused, see letter 12 th December 1997 from Connolly and Co. to Mr. Hattersley, annexure E.E.

27\_\_\_ The assessment of costs then came before Mr. Hattersley, Mr. Benjafield swore a statutory declaration dated 17 th August 1998, in which he agreed a conference took place about the Plaintiff's action under the insurance policy, he said that his understanding was that a decision was required from the firm, if it continued to act and it advised the Plaintiff that they would cease to act unless the fees were paid, see annexure to Mr. Connolly's affidavit at p.121. In the declaration in paragraph 6, he said to the best of his recollection he agreed with Mr. Connolly that the firm would continue nominally to represent Mr. MacDonald but all labour and costs being provided and met by A.R. Connolly and Co. He said it was the wish of Mr. MacDonald to determinate the proceedings at that time and not incur any further costs, but it was Mr. Connolly's opinion, apparently, that there was more than an arguable case on this question. He stated his view to Mr. Connolly that Mr. MacDonald would lose.

28\_\_\_ He said it was not his intention to give away any fees already incurred but to delay recovery to allow the proceedings to continue and that such intention was conveyed to A.R.Connolly, it was further intended to put at risk any further fees which the firm might incur from that day forward, ie. from September 1994.(See annexure iii page 21).

29\_\_\_ Mr. Connolly alleges the statutory declaration was not served on his firm until 15 th October 1998 after he had provided his statutory declaration on 19 th August 1998, and thus the assessor did not have his responses,( see paragraph 22.C).

30\_\_\_ The assessor in his reasons of 30 th October 1998, annexure K.K.K., stated:

"The Defendant sought to recover costs at the rate of \$195.00 per hour based on a retainer agreement"

31\_\_\_ He upheld that agreement and assessed the costs on that basis. It appears the Plaintiff had paid part of the costs, Mr. Hattersley reduced the claim as to time spent by the Defendants by 14.5 hours or a reduction of \$195.00 per hour of \$2827.50, the disbursements claim was \$6362.36, the total assessment was \$18,520.61, the Plaintiff having paid \$9031.00 leaving a balance of \$9501.61 payable.

32\_\_\_ He then referred to the question of the alleged agreement made between Mr. Connolly and Mr. Benjafield on behalf of the Plaintiff, in doing so he referred to the statutory declarations made, and accepted the evidence and the explanations of the Defendants as being more probable in all the circumstances. He then made a finding that the Plaintiff owed the Defendants the sum of \$ 9507.61 plus a filing fee of \$153.48, a total of \$ 9661.09

33\_\_\_ An appeal was lodged by the Plaintiff against the decision pursuant to Section 208 L of the Legal Profession Act 1987 . The affidavits in this matter were also filed in that appeal, the matter came before Sperling J. on 3 rd February 1999 and His Honour took the view that fresh evidence in the appeal was not allowable, ( s . 208L of the Act) . Consequently His Honour refused to allow the affidavits to be read. His Honour then came to the conclusion there was sufficient evidence before Mr. Hattersley to support the facts as alleged by the Defendants and went on to assess costs.

34\_\_\_ Sperling J. then considered the question of consideration in the alleged agreement. His Honour said, p. 3:

"The consideration was that the Defendants stood to gain the benefit of the fees to be earned in the event that Mr. MacDonald was successful in the litigation, by "to be earned"

I mean to be earned after the asserted conversation between the solicitors :

"Had the Defendants not made the agreement on the Plaintiff's case it would have been open to the Plaintiff to go elsewhere for legal representation, subsequent to the dialogue between the solicitors."

35\_\_\_ His Honour then dismissed the appeal. This amended summons was then filed under Section 208M of the Act which permits fresh evidence to be adduced in the appeal.

36\_\_\_ This is quite an extraordinary case, as I have pointed out earlier. There were assertions in the correspondence by the Defendants that any agreement as to costs related to future costs that one could well understand in those circumstances the cost assessor finding on the balance of probabilities that that was more likely to be the agreement than the one referred to by Mr. Connolly. Mr. Benjafield has not sought to contest the material filed on behalf of the Plaintiff, thus the material in Mr. Connolly's affidavit is accepted.

37\_\_\_ No point is taken as to my power to set aside the costs order and no argument is put in favour of the costs assessor finding or otherwise. The only point taken by the Defendant is that the contract between Connolly on behalf of the Plaintiff and Mr. Benjafield on behalf of the Defendants is that it is unenforceable because there has been a total failure of consideration

38\_\_\_ It is important to note that the statement of the ground under Part 51A Rule 5 is annexed to the further amended summons, once again it causes difficulties in interpreting just what did happen in this case, in paragraph three of the statement it was said:

"In consideration of the Defendants agreeing to forgo their fees for acting on behalf of the Plaintiff in District Court proceedings at Sydney NO. 2787/89 in the event that the Plaintiff's claim against the Third Party professional insurer failed the Plaintiff agreed to continue using the services of the Defendants and to pursue with other solicitors an appeal from the Judgment in the District Court if the Judgment was against the Plaintiff and in favour of the Third Party professional indemnity insurer."

51A Rule 5 is in the following terms:

"The Plaintiff shall file and serve with or subscribe to the summons instituting the appeal a brief but specific statement of the grounds relied upon in support of the appeal and as to whether the appeal is from the whole or part only and what part of the decision to the Tribunal below."

39\_\_\_ It is alleged by the Plaintiff that the costs assessor erred a) in concluding that no agreement alleged by the Plaintiff was reached on 13 th September 1994 between Messrs A.R. Connolly and Company on behalf of the Plaintiff and Messrs Benjafield Milne, and b) by failing to find that there was an agreement between Messrs A.R. Connolly and Company on behalf of the Plaintiff and Messrs Benjafield Milne that the Plaintiff would not be required to pay the fees to Messrs Benjafield Milne for their work for the Plaintiff in the District Court proceedings No. 2787/89.

40\_\_\_ The point taken by Mr. Gray, is that there is no consideration passing to the Defendants on the terms of the contracts alleged. In other words, his submission is to the effect that there was no enforceable contract at the date of the conversation between Mr. Connolly and Mr. Benjafield on 13 th September 1994. The basis of his submission is that the District Court proceedings had two components: firstly the claim by Mrs. Aleksanian against the Plaintiff and his Mother: and secondly the claim for indemnity against C.E. Heath. The proceedings in respect to Mrs. Aleksanian were settled by both the Plaintiff and his Mother in April 1994, the proceedings against C.E. Heath were stood over from April to September. After the settlement, the Defendants submitted their accounts for professional costs and disbursements. Exhibit W.W., Mr. Connolly's affidavit, these three accounts were rendered in respect to professional work and disbursements occurred up to that date, it is submitted the amounts therefore had been earned for work done.

41\_\_\_ Mr. Connolly in paragraph 8 of his affidavit asserts he is acting for the Plaintiff, the important point, it is submitted, is that the proposal that Mr. Connolly put to Mr. Benjafield is that:

"You will continue acting for Mr. MacDonald when the Hearing resumes on 28 th September."

42\_\_\_ Mr. Gray points out that in Mr. Connolly's affidavit, annexure A, in paragraph 3 he states:

"We also note your agreement that we act as your Agents in preparing the matter for Hearing and briefing and instructing Counsel for the remainder of the proceedings."

43\_\_\_ Mr. Gray submits what Mr. Connolly was saying, or indeed what happened is that his firm effectively took over the whole of the work in the case, the Defendants did nothing. On that basis the agreement Mr. Connolly propounds is that the Defendants give up their unqualified entitlement to the fees they have already earned and in exchange for fees owing on a contingency basis, in other words it is submitted, the benefit to Mr. MacDonald is that instead of having an unqualified liability to pay the fees, he now has a qualified liability to only pay them if he wins the case. Mr. Gray posed the rhetorical question : "What do the Defendants get out of the agreement?" And he answers it by saying: "Nothing." The position he submits was that they were not going to continue to act unless they were paid the fees already owing by the Plaintiff. The Plaintiff claims they were not paid because they entered into this agreement instead. The agreement, however, provided Mr. Connolly would do all the future work, I infer in those circumstances that Mr. Connolly would have been paid for the work he did if the Plaintiff had won the case, seeing the Defendants did nothing further in the case.

44\_\_\_ Mr. Gray submitted that the costs assessor sought certain answers as to what was in issue, on this question of costs I referred to this matter earlier, the answer from Mr. Connolly was that none of the accounts were disputed. Mr. MacDonald, Mr. Gray then submits gave up nothing, and that the agreement was all one way, all the benefits went to Mr. MacDonald who ceased to have the unconditional obligation to pay. Mr. Morahan, on behalf of the Plaintiff submits there is consideration, but that alleged consideration goes outside the terms of the contract pleaded. He submitted, referring to paragraph 3 of a forbearance to sue it is also submitted the consideration is further in them remaining instructed and retaining the rights that that entails, namely that they would continue working on the matter and take it to its ultimate. What rights in effect were reflected in working on the case is not easily perceived.

45\_\_\_ It is also submitted that the Plaintiff had paid approximately \$9,000.00 odd towards their costs.

46\_\_\_ Even if I were to consider the question of forbearance to sue for alleged incompetency, Mr. Gray submitted there is no substance in that allegation. Mr. Gray in his submission referred to the statutory declaration by Mr. Connolly on 1 st August 1998, page 98 of the annexures to his affidavit. At this point the case had been settled and that of Mrs. MacDonald, each paying \$20,000.00 to the Plaintiff, the terms applied to both and Mr. Connolly was acting for her.

47\_\_\_ It is readily apparent that Mr. Connolly was really the one advising the Plaintiff at this point of the case, this becomes readily apparent when one reads the statutory declaration of Mr. Antoneas.

48\_\_\_ In his declaration Mr. Connolly (19 th August 1998 annexure AAA(a) page 98 of the annexures to his affidavit), he raises specifically the competence of the solicitor handling the matter on behalf of the Defendant and made a serious wide-ranging attack on this person's competence, (see paragraph 10), not only did he make that allegation, but also made the allegation that the costs charged were considerably excessive,(see paragraph 18 of that declaration).

49\_\_\_ In answer, to the above, Mr. Antoneas in a statutory declaration sworn on 4 th September 1998, annexure GGG (a) page 112 of the annexures to Mr. Connolly's affidavit, he set out his considerable experience in the law. It is to be noted he formed a belief which I believe is well-founded that the Plaintiff was keeping Mr. Connolly advised as to the preparation of the case, (see para 13.b). He advised the Plaintiff that his chances of success were slim (see para 6). Furthermore the Plaintiff expressed satisfaction for the work Mr. Antoneas had performed ( para 13, in particular para 13.c). There was no reply to this statutory declaration as far as I can ascertain.

50\_\_\_ On the face of the material that I have before me there is no basis for the wild allegations made by Mr. Connolly as to the competence of Mr. Antoneas. It also appears both Mr. Benjafield and Mr. Antoneas had a much better appreciation of the legal problems involved in the claim for indemnity against C.E.Heath than did Mr. Connolly. In those circumstances I find it hard to accept that there is any basis in any alleged promise to forgo to sue the Defendants. I point out this was not alleged in the pleadings in this matter .

51\_\_\_ On the question of the total failure of consideration I was not referred to authority.

52\_\_\_ Consideration is something that must have some value in the law, but it need not be of equivalent value. In *Curry -v-Misa* 1875 10 LR 10 ex at 153 at 162:

"A valuable consideration in the eyes of the law may consist either in some right, interest, profit or benefit accruing to one party or some forbearance detriment, loss or responsibility given, suffered or undertaken by the other."

53\_\_\_ It must be conceded that the authorities show that the consideration may be tenuous in the extreme, see for example *Carlill -v-Carbolic Smokeball Company* 1892 2 Q.B.D. at 424.

54\_\_\_ The Courts, however, have found in certain circumstances that there is no consideration and the worth of the apparent undertaking is illusory.

55\_\_\_ In this matter I have come to the conclusion that there was a total failure of consideration on the terms of the contract as alleged in the pleading. I fail to see the advantage accruing to the Plaintiff in agreeing to the terms of this contract in consideration being that they remain as solicitors on the record. In my view that was a total illusory consideration, it would be different if they were to do the work as solicitor because then it may be argued the consideration was the additional fees that would accrue as a result of them being retained. Realistically the agreement, however, was that Mr. Connolly was to do all the work, including the briefing of Counsel and I infer from that he would be paid for that work. In those circumstances there would be no benefit to the Defendants remaining on the record.

56\_\_\_ Even if I am wrong in concluding that the agreement I should consider is the one pleaded I would not have found the allegations of Mr. Connolly of negligence in the handling of the matter because to be such as to provide consideration on the material before me there was no basis for these allegations. As I pointed out earlier Mr. Connolly's client also settled on the basis of Mr. MacDonald's settlement. Any alleged negligent professional work only related to the action against Mr. Heath of Heath & Co. which was taken over by Mr. MacDonald.

57\_\_\_ The orders sought in the further Amended Summons filed pursuant to leave granted by Sperling J are dismissed with costs.

**Last Modified: 10/06/1999**

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