IN THE DISTRICT COURT
AT HAMILTON

I TE KŌTI-Ā-ROHE
KI KIRIKIRIROA

CIV-2020-019-000315
[2021] NZDC 16977

BETWEEN	ITESYS AG Plaintiff
AND	CENTRIX CONSULTING LIMITED Defendant

Hearing: 8 July 2021

Appearances: P Anderson for the Plaintiff
D Shore for the Defendant

Judgment: 23 August 2021

RESERVED DECISION OF JUDGE I D R CAMERON

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[1] The plaintiff Itesys AG seeks to recover $51,485 it says it paid by mistake to the defendant Centrix Consulting Limited. The brief facts are that the plaintiff is a Swiss company operating as an IT technical service provider. The defendant provided an IT consultancy service to the plaintiff between 2016 and 2017. The defendant was then known as Itesys New Zealand Limited (ITS). In January 2020 it changed its name to Centrix Consulting Limited. It's sole director is Stefan Mayer, who now owns 100 per cent of the shares. The plaintiff held 24.9 per cent of the shareholding until January 2020.

[2] In about June 2017 the board of the plaintiff decided to terminate its relationship with ITS. On 15 June 2017 the plaintiff incorporated another company in New Zealand fully owned by it and informed Stefan Mayer of this by email dated 4 July 2017. The plaintiff was ITS's sole source of income, and understandably Stefan Mayer was upset about this. No further services were requested of ITS by the plaintiff

or provided to it by the defendant after June 2017. All services that ITS had provided to the plaintiff stopped.

[3] The last invoice from ITS dated 30 November 2017, being for previous work, was not paid in full by the plaintiff until 30 July 2018.

[4] The new company which the plaintiff incorporated to provide IT services from New Zealand was called Eboracum Ltd. That name was changed to Itesys Ltd on 28 September 2018, that company being a fully owned subsidiary of the plaintiff. All IT services from New Zealand since June 2017 have been provided by the plaintiff's wholly owned subsidiary.

[5] Communications with Stefan Mayer recommenced in 2019. Sascha Lioi, the managing director of the plaintiff, by email asked Stefan Mayer to change ITS's name to a name that did not contain the word "Itesys". The relevant email of 25 February 2019 offers Mr Mayer $5,000 to change Itesys' name. By email of 25 February 2019 Mr Mayer responded with a counteroffer that the plaintiff pay him $85,000, or alternatively $65,000 together with an unspecified apology and a transfer to Mr Mayer of its 24.9 per cent shareholding in ITS. He stated that on that basis he would change ITS's name.

[6] On 27 February 2019 Sascha Lioi responded by email to Mr Mayer declining his counteroffer. The email advised Mr Mayer that the plaintiff was willing to transfer its shares in ITS to Mr Mayer and pay him $7,500 to have ITS change its name.

[7] By email of 27 February 2019 Mr Mayer responded by saying he would change ITS's name if the company transferred its shares in the company to him and made payment to him of $65,000.

[8] Sascha Lioi responded by email of 27 February 2019 saying that such amount was "completely absurd", that never would any consensus be reached at that level, and stating his offer (namely to pay $7,500 and transfer the shares in exchange for ITS's name being changed) stands.

[9] At that point negotiations broke down and there was no further contact between Sascha Lioi and Mr Mayer until January 2020, some eleven months later.

[10] Mr Mayer sent Sascha Lioi an email on 23 January 2020 stating that ITS would change its name provided the plaintiff transferred its 24.9 per cent shareholding to him. There was no reference to any monetary amount being required. He attached a transfer form. Sascha Lioi signed the share transfer form on behalf of the plaintiff and emailed it back to Mr Mayer on 24 January 2020.

[11] A few days later Sascha Lioi learnt from the plaintiff's Chief Financial Officer, Christian Manser that $NZ51,500 had mistakenly been paid by him on behalf of the plaintiff to ITS. He had meant to send the money to Itesys Ltd, the plaintiff's wholly owned subsidiary, for services rendered. He mistakenly selected the wrong payee, which at the time appeared in the same dropbox on his computer as the current payee. Sascha Lioi instructed Mr Manser to contact Mr Mayer and advise him of the mistake and to request that the funds be returned to the plaintiff's bank account. Mr Manser did this on 28 January 2020 by email. Stefan Mayer refused to refund the monies and hence these proceedings were brought.

[12] Mr Mayer gave evidence that when he received the payment of $52,485 ($51,500 less bank fees) he assumed that the payment had been made by the plaintiff in exchange for ITS changing its name and having the 24.5 per cent shareholding held by the plaintiff transferred to him. His evidence was that his offer to accept $NZ65,000 made on 27 February 2019 was still open for acceptance and was not withdrawn. He stated that when he received the payment he proceeded on the basis that the plaintiff had reluctantly agreed (but with a reduced price), particularly as the plaintiff then signed and returned the share transfer form without question. His evidence was that when he received the funds and was then advised that it had been a mistake he did not believe the plaintiff, and thought they were trying to trick him. His evidence was that the plaintiff had annoyed him by not paying the defendant's 30 November 2017 invoice until 30 July 2018, and he thought the plaintiff was up to tricks again.

[13] By contrast the plaintiff's position is that Stefan Mayer must have known all along that the payment was a mistake, and that he simply took advantage of that and

kept the funds. As to signing and returning the share transfer form, Sascha Lioi's position is that he assumed Mr Mayer only wanted the shares transferred to him and was no longer seeking payment for the name change.

[14] There are a number of difficulties with Mr Mayer's version and what he maintains he believed at relevant times. First, that the defendant had provided no services to the plaintiff since June 2017, and as such no payments were awaited. Next, as an experienced businessman Mr Mayer must have known that his final offer to accept $65,000 had been rejected by the plaintiff, the plaintiff describing it at the time as "completely absurd" and stating that its offer (of $7,500 for a change of name and transfer of shares) stood. Given the wide gap between the plaintiff's and defendant's figures when negotiations broke down, it would be almost inconceivable for the plaintiff to have made payment of a sum at a level approaching the defendant's last offer, and without any explanation as to why the payment was being made. Next, if Mr Mayer had genuinely believed that this was payment at a level approaching his last offer (i.e. at a reduced price) then undoubtedly he would have acknowledged and commented on the receipt of the funds when he sent the share transfer form to Sascha Lioi. However, Mr Mayer's email attaching the share transfer form is silent as to the receipt of the funds. Next the defendant's refusal to repay the funds on the stated basis that on receipt of them he had already dissolved ITS is utterly unconvincing. Not only is it factually inaccurate but it has nothing to do with the fact the defendant had received funds that it was not entitled to.

[15] I accept the plaintiff's evidence that the payment was a genuine mistake, and the plaintiff's evidence as to how this mistake occurred. I also accept that Sascha Lioi did not know of the mistaken payment when he signed and returned the share transfer form, and that he assumed Mr Mayer no longer sought any monetary amount for changing the name. I reject the defendant's evidence that on receipt of the funds he considered that this was a voluntary payment by the plaintiff to have him change the name of ITS. If he was in any doubt about this when those funds were first received (which I do not accept), then any such doubt would have been dispelled once he was advised of the position by the plaintiff on 28 January 2020. To then claim he was not in a position to refund the money because he had transferred the shares to himself and applied for a change of name of the company is a lame excuse, as the defendant had

received the funds only days earlier (22 January 2020) and there is no suggestion that the funds were no longer available to be refunded.

[16] In his evidence in Court Mr Mayer now accepts that the payment by the plaintiff to the defendant was a genuine mistake. Mr Mayer referred to various open offers he has made to return some of the funds less his legal costs (said to be $32,300 with work in progress of approximately $11,500 as at the date of the hearing). However, I find that the defendant knew on receipt of the funds that they did not belong to him. I find that Mr Mayer acted in bad faith by not immediately refunding the money to the plaintiff. Accordingly, the defendant's affirmative defences are not made out, and the defendant had no right to retain any of the money for costs or any other reason.

[17] The two causes of action against the defendant are for unjust enrichment and money had and received. In relation to the money had and received claim, I find that the plaintiff did pay money to the defendant that would not have been paid but for the mistake of fact. That mistake of fact was the plaintiff's Chief Financial Officer selecting the wrong payee in the plaintiff's accounting software programme when the funds were paid. I also find the defendant knew it had no claim on the funds for the reasons discussed.

[18] In relation to the unjust enrichment, given those findings and the fact that the defendant had no claim on the funds, it would not be equitable for it to retain those funds. The two causes of action succeed as a result.

[19] Accordingly, I make the following orders:-

(a) Judgment for the plaintiff against the defendant in the sum of $51,485 (being $51,500 less bank fees).

(b) An order that the defendant pay $51,485 to the plaintiff.

(c) An order that the defendant pay to the plaintiff interest on the sum of $51,485 pursuant to s 10 of the Interest on Money Claims Act 2016 from 22 January 2020 to the date of this judgment.

(d) That the defendant pay the plaintiff costs on a category 2B basis, subject to either party having leave to apply further in relation to costs.

I D R Cameron
District Court Judge