IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON DISTRICT
NAPIER REGISTRY

A. No. 45/70

BETWEEN COLIN BERKLEY SUDFELT formerly of Whakatu, Orchardist but now of Whakatane, Shop Manager.

Plaintiff

No Special Consideration

A N D MARTIN FRANCISCUS PETERUS JANSSEN of Hastings, Orchardist.

Defendant

Hearing: 26-8 October and 5 November 1971.

Judgment: 13 December 1971

Counsel: Bannister and von Dadelszen for the plaintiff, Bisson for the defendant.

JUDGMENT OF QUILLIAM J.

The plaintiff was the owner of an orchard comprising 10 acres situated at Whakatu near Hastings. He acquired the property 6 or 7 years ago and carried on the business of an orchardist on it during that period. The trees were mainly apple and pear trees but with some peach trees also. Towards the end of 1969 he found that he could not carry on with the orchard as his wife's health did not permit her to assist him and he himself was suffering adverse effects from the continued proximity to the sprays which had to be used. He accordingly sought to sell the property as a going concern. For this purpose he engaged a land agent who advertised the property for sale in a local newspaper. The first advertisement which appeared in the Hawkes Bay Herald-Tribune of the 3 January 1970 was as follows: -

"ORCHARD. 10 acres in full production
"(mainly pip) good gate sales,
"comfortable 3 BR accommodation, 700
"case cool store, all plant included,
"opportunity here, estimated income
"$12-15,000, possession 1 month, finance
"available. $34,000. "

The second advertisment appeared in the same paper of the 27 Jnuary 1970 and was as follows: -

> "ORCHARD. 10 Acres, mainly pip,
> "in full production, good gate sales,
> "comfortable 3 BR home, 700 case
> "cool store. Estimated income $14,000.
> "All plant included. Finance available.
> "$34,000. "

The defendant saw both advertisements and discussed the possibility of purchasing the property both with the agent and with the plaintiff. It seemed unlikely that he could raise enc finance for the purchase but in any event the plaintiff went ahead with a sale of the property to the Hawkes Bay Farmers' Meat Company. Negotiations between the parties then changed to a discussion of the possibility of the defendant purchasing only the season's crop of fruit and the plaintiff's plant and equipment. On the 1 February 1970 an oral agreement was made between the parties and this was later reduced to writing. The written agreement was not signed until the 27 February 1970. The agreement provided for the purchase by the defendant of the orchard crop for the price of $6,000 and of the plant and equipment for a further $3,500. Of the total price of $9,500, $6,000 was payable upon the execution of the agreement and the balance at the expiry of the term within which the crop was to be removed, namely 30 June 1970. The defendant was able to find $3,000 in cash. His solicitor arranged a loan of a further $3,000 on the securit of the plant and equipment. On the 27 February 1970 $4,000 was paid to the plaintiff's solicitors and on the 3rd of March a further $2,000 was paid. No further payment has been made and in this action the plaintiff sues for recovery of the balance of the purchase price, namely, $3,500.

The defendant admits the contract and the non-payment of the $3,500, but counterclaims for $6,311 on the basis of fraudulent misrepresentations by the plaintiff, or in the

alternative, breach of warranty or innocent misrepresentation. At the hearing, leave was sought to amend the amount of the counterclaim to $6,390. I reserved this question, but in view of the conclusions which I have reached it is unnecessary for me to determine it.

By reason of the defendant's admission of the contract, the real matter in issue was the defendant's counterclaim, on which he carried the onus, and the defendant therefore commenced.

I should mention at the outset that the allegation of fraud was never really pursued by the defendant and I have no hesitation in saying that the evidence at no stage disclosed the slightest suggestion of fraud. The case proceeded throughout on the basis that there had been representations made by the plaintiff which amounted to warranties. The representations alleged were first: that the estimated income from the property was $12,000-15,000; secondly that the defendant would get 14,000 cases of fruit from the crop and that the gross income from the crop would be $14,000; and thirdly, that the plaintiff had kept the spray programme for the crop properly up to date.

There can be no doubt at all that the first representation was made by the plaintiff. The newspaper advertisement of the 3 January 1970 states it in the clearest terms. Some attempt was made to suggest that the land agent had exceeded his authority but it is plain from the evidence that he merely used the information supplied to him by the plaintiff and that the plaintiff approved the advertisement. There was, therefore, a representation by the plaintiff that the estimated gross income for his property was $12,000-15,000.

The second representation alleged was that the plaintiff had said that the defendant would get 14,000 cases of fruit and that the gross income from the crop would be $14,000. There is no doubt as to the latter part of the allegation because the advertisement of the 27 January 1970 states clearly

"estimated income, $14,000". The plaintiff's agent said tha this was a figure inserted by him when he was reducing the len of the previous advertisement (in order to save expense) and that it simply represented a figure party-way between the prev estimate of $12,000-15,000. This was nonetheless a representation made by the land agent on behalf of the plainti and acting within the scope of his authority. The allegation regarding the 14,000 cases of fruit depends upon the evidence of the defendant as to a conversation he had with the plaintiff during the course of negotiations. The defend command of English was far from good and it was often difficul to understand what he was saying. It was also difficult to know whether he had properly understood what was said to hi The plaintiff's evidence was that he had given an estimate of 10,000-11,000 cases but hoped for more. I think it very likely that the defendant has confused the number of cases he says was referred to with the estimated gross income as advertised and I am not prepared to find that he has established the representation that the plaintiff said there would b 14,000 cases. This finding, however, has little, if any, bearing on the result.

The third representation alleged was that the plaintiff had told the defendant he had kept his spraying programme properly up to date. This allegation was admitted by th plaintiff both in the pleadings and in the evidence.

It must next be considered whether the representatio which have been established were made by the plaintiff with the intent that the defendant should act upon them and whether the defendant was in fact induced to act upon them. I think it is clear that the first of these questions must be answered affirmatively. The plaintiff was anxious to dispose of his orchard. The information he supplied to the land agent was for the purpose of attracting a buyer and in particular the representation as to estimated income was

plainly intended to be acted upon. The second question is a good deal more difficult. The plaintiff said that the defendant did not in fact act upon these representations but upon his own inspection and judgment. Having regard to my assessment of the defendant, I cannot lightly dismiss this assertion. The defendant is a Dutchman who came to New Zealand in 1953 at the age of 21. He appears to have brought with him all the qualities of enthusiasm, energy and diligence for which the people of Holland are, I believe, renown He is also however, in my judgment, impetuous and oversure of his own abilities and business acumen. I consider it clear upon the evidence that in respect of some matters at least he preferred his own views to those of people whom he should have regarded as better qualified. So far as the purchase of the crop was concerned, the defendant made his own inspection of the orchard and he also had inspections made on his behalf by an officer of the Agriculture Department and a representative of the Hawkes Bay Fruitgrowers' Federation. Unfortunately, I did not have the benefit of the evidence of these men. An experienced orchardist, Mr Cacciopoli, who was called for the defendant and who knew him well said that he would have expected the defendant to have sufficient experience to have been able to make , with fair accuracy, an estimate of the yield in cases from his inspection of the crop. It seems unlikely, therefore, that the defendant would have relied upon any estimate of yield which may have been made by the plaintiff. On the other hand, it appears that only an expert and experienced orchardist could have told by his own inspection whether the spraying programme had been properly carried out. The defendant was probably not sufficiently experienced to have been able to do that and I accept that he did rely upon the plaintiff's representation to this effect in entering into the contract. Spraying with the right materials and at the right times was shown to be vital to the success of an orchard business and it was apparent from

the evidence that it was common practice to accept the owner's statements as to his spraying programme.

The result of the defendant's operations between the 1st of February and the 30th of June was that he achieved a gross income of $7,610. This was far short of the $14,000 which he relies upon as the income represented to him by the plaintiff, and he accordingly counterclaims for the difference. This counterclaim is based on the allegation that due to the inadequacy of spraying by the plaintiff the crop developed diseases, namely, Black Spot and Leaf Roller, which disasterously affected the quantity of fruit sold and the prices which could be obtained for it. It is not perhaps without significance that one of the defendant's allegations was "that the spraying of the crop should have been completed by the 2 February 1970". It is very clear that a great deal of spraying was called for after that date and it is the plaintiff's defence to the counterclaim that it was the defendant himself who neglected the spraying and so brought upon himself any loss from disease. The plaintiff also alleged that the defendant's methods of picking were wrong and contributed to the loss.

I accept that the defendant experienced considerable loss through Black Spot and Leaf Roller appearing in the fruit. This case requires to be decided primarily on the issue of spraying and I must therefore make some preliminary comments on that subject.

The plaintiff's orchard had a number of different varieties. The first to be ready for picking were the Gravenstein apples, then the William Bon Cretian pears, followed by the Kidd's Orange apples. Then came the Winter Cole pears, Golden Queen peaches, Golden Delicious, Delicious and later varieties of apples. A wide range of sprays was necessary in order to deal with all these varieties. Spraying of a particular variety would normally need to stop a number of days

before the picking of that variety commenced, but subject to that it was essential to spray at the right times and in a thorough manner. It was not possible to workout a rigid plan of spraying in advance, based on lapses of time, because weather conditions could require urgent spraying quite soon afte a previous spraying. Commercial firms who supply these spray materials also have available men with the training and experience to be able to advise orchardists as to the spraying programme necessary for a particular orchard and who pay regular visits to advise and to ensure that all proper spraying is done. Just such a person was Mr Lee who had supplied the plaintiff's spraying requirements and advised him on his programme for two full seasons prior to the season in which he sold to the defendant.

The defendant's case started on the basis that the really vital time for correct spraying was in about October, but it emerged that any relaxation of correct spraying procedur up to the time of picking could result in the quick onset of disease. I can see no evidence at all to enable me to conclude that there had been inadequate spraying by the plaintif in October or any of the earlier months.

The defendant said that he inspected the orchard at the end of January 1970. He was clearly impressed by the size of the crop and he looked for signs of disease. All he found was a little Black Spot on the Kidd's Orange apples but his own view of that was that it was trifling and nothing to worry about. The plaintiff agrees that there was this very minor sign of Black Spot but he also regarded it as of no consequence. The defendant had arranged for an officer of the Department of Agriculture and a representative of the Fruitgrowers' Federation to inspect also. There was no evidence from these men, but I think I can fairly conclude that there were no greater signs of disease in the orchard at t end of January than those referred to by the defendant.

For the defendant reference was made to his having found the worst infestation, particularly in the Kidd's Orange apples, at the top and outside of the trees. It was suggested that this indicated the presence of disease at the end of January dating back some time prior to that. I do not draw any such inference. I think that if the disease was present to such a marked extent as would have been necessary to support that inference then it was likely to have been noticed by at least one of the persons who inspected the orchard. Mr Lee, who was the only expert witness to have seen the orchard at the end of January 1970, had then seen no signs of disease. The last spraying done by the plaintiff was on the 25th of January.

When the defendant took possession of the crop on the 2nd of February, the Gravensteins had been partly picked. He completed picking these and found no disease in them. He then picked the William Bon Cretian pears and has no complaint about these either. He then started on the Kidd's Orange. This was between the first and second weeks after he took possession. The defendant said that the Kidd's Orange were then found to be heavily infested with Black Spot so that there were very few first grade fruit among them. Most of them had to be sold at heavily reduced prices and large quantities were good only for pig food. Next were the Winter Cole pears and these were said to be so affected by Leaf Roller as to be worse than the Kidd's Orange. Similar trouble was experienced with the Golden Delicious. Later varieties were less seriously affected. The result of all this was that notwithstanding a very heavy crop of fruit the defendant could achieve only a relatively small return for it. Whether or not the incidence of disease was as great as the defendant alleges, it is clear that there was a very substantial infestation. What then was the reason?

There can be no doubt at all that the existence of

disease was due to inadequacy of spraying. The defendant says that this was the fault of the plaintiff in not spraying properly in October and November and also on the last occasion on the 25th of January. The implication of defendan allegation is that the crop was badly affected (although not necessarily so as to be obvious to casual inspection) when he took possession. On the other hand, the plaintiff says that the crop was for all practical purposes clear of disease at the end of January and that the defendant failed to keep up subsequent spraying with the result that disease quickly spread and became out of control. I have no doubt at all that the latter is the correct version.

The plaintiff's orchard had in the two previous seasons shown no signs of disease. This was the evidence of Lee and as I am relying very largely upon his evidence I should mention at this stage something about him. He is the Produce Manager of Skelton Ivory Ltd. and has been with that firm for five years. He also had previous training with another firm and has attended many courses to qualify him for his work. I was particularly impressed by the way he gave his evidence and with his apparent grasp of his work. He visited the plaintiff's orchard each fourteen days and kept up a constant supervision of his spraying programme, supplying whatever materials were needed. It is clear that Mr Lee not only did these things for the promotion of his employer's business but also that he took a personal interest in his customers. He also kept records of rainfall. Humidity was the stimulation for diseases such as Black Spot and the weather conditions greatly affected spraying requirements and called for alterations to spraying programmes. The rainfall figures recorded by Mr Lee were taken on his own property which was about three-quarters of a mile in a straight line from the plaintiff's property. These figures are significant and were as follows: -

October, 1969	1.07"
November, 1969	1.14"
December, 1969	0.83"
January, 1970	3.7"
February, 1970	2.08"
March, 1970	1.53"
April, 1970	4.64"

From these figures Mr Lee was able to say that the likelihood of Black Spot developing would be very high from the middle of January to the end of April 1970. This meant in turn that the need for spraying was correspondingly more important. It called for spraying about every seven to 10 days during that period. A Black Spot lesion will grow from the size of a pin head to the size of an average thumb nail in ten days. The application of spray, however, will kill immediately any Black Spot then growing. It will not eradicate the Black Spot but it will stop it from progressing.

The defendant's evidence was that from the time he took over the crop he sprayed every fortnight strictly in accordance with the handbook supplied by the Fruitgrowers' Federation. This handbook was not produced but it was clear that the defendant claimed to have achieved a thorough coverage of the appropriate varieties with sprays of the correct type. The plaintiff, having sold his crop to the defendant, continued to live in his house on the property until the end of February. He said that he observed one brief spraying late in February and no other spraying at all by the defendant during that month. There were some discrepancies in the plaintiff's evidence and I might have hesitated to have accepted it on this point but for the fact that it is strongly supported by other evidence. As it is, however, I accept

the plaintiff's evidence on this.

The defendant said that he used for his regular fortnightly spraying the sprays left in his shed by the plainti augmented by a purchase of one type of spray, Kelthane, to a value of about $32.00. His evidence was that these materials were sufficient to enable him to do all the necessary spraying and to leave him at the end of June with the quantities of spray which he listed on an exhibit produced in evidence. As I regard this exhibit to be of considerable importance, I set it out in full as follows: -

" LIST OF SURPLUS SPRAYS

BASUDIN	36 lbs.
D.D.D.	60 lbs.
D.D.T.	48 lbs.
KELTAN	24 lbs.
THIRAM	40 lbs.
TOTAL	208 lbs.

"

Mr Lee's evidence was that the plaintiff ordered spray only as he required it on the basis of keeping one complete spray ahead. I accept his evidence on this. The sprays required to be used are expensive and I regard it as unlikely that the plaintiff would have accumulated any unnecessary quantity. There could, of course, have been relatively small amounts left over from time to time and allowed to accumulate but I should not regard these as significant. I observe from the invoices produced that the quantity normally supplied at a time was about 28-56 pounds depending on the type of spray. This would seem to support Mr Lee's evidence. I conclude from all this that if the defendant sprayed fully and with the regularity

he claimed, using only materials left by the plaintiff together with some Kelthane purchased by himself, and still had left over the quantities set out in the list he produced, then the plaintiff must have left for him very substantial quantities indeed. None of the evidence supports this and I reject it. Indeed, in order to test this proposition, I asked Mr Lee to calculate the quantity of one type of spray, Basudin, which the defendant would have required had he sprayed fortnightly throughout February, March, April and May according to the varieties needing spraying during that period. Mr Lee's calculation, which was necessarily approximate, was 70-90 pounds. Taking the lower figure and adding to it the 36 pounds left over at the end, this must mean that the plainti left a minimum of about 100 pounds of Basudin at the end of January. Mr Lee said that the plaintiff never had such a quantity at one time and I accept that as being plainly true. The fact of the matter is that the defendant did not, in my opinion, spray as he claimed. I accept the evidence that when he did spray he did so hurriedly and largely ineffectively. I have no hesitation in finding upon the evidence as a whole that the defendant failed to maintain a proper spraying programme and that this accounts for the disease which appeared. Even if he had sprayed fortnightly as he claimed, the weather conditions were such that this would almost certainly have been inadequate. I do not think, however, that he did spray fortnightly.

It was argued for the defendant that the plaintiff's last spraying on the 25 of January could not have been properly carried out and that this was the real cause of the disease in the Kidd's Orange apples and Winter Cole pears. This argument was based on the evidence of the plaintiff and the defendant that there was a little Black Spot apparent when the defendant inspected at the end of January and that a proper spraying would have stopped this from spreading. I

can draw no conclusion adverse to the plaintiff from this evidence. I am not able to say that the Black Spot of which the defendant complained was a further growth of the signs observed by the defendant and which he regarded as insignificant. It is much more likely that what the defendant saw was a very early infestation which had indeed been killed by spraying but the signs of which would, of course, have remained. The control of Black Spot was in the defendant's own hands as from the 2nd of February. If it had developed to the stage he claimed by the time he started picking the Kidd's Orange towards the middle of Febmary, then he should have observed it much sooner and stopped it by spraying. The more probable explanation is that his own failure to spray allowed the disease to appear and, in the wet weather encountered in February, to flourish at a fast rate.
I have not overlooked the fact that the defendant said he had little trouble with disease in the late varieties of apples. It was argued that this showed he must have sprayed. I think the probable explanation is that such spraying as he did was done to these varieties and as these trees were more open and less heavily wooded than the Kidd's Orange he did achieve some reasonable protection for them. It has not been suggested tha he did no spraying at all but that what he did was too little an was inadequately done.

I should refer to the fact that the defendant was spoken of very highly by several witnesses as a very competent and experienced picker. I accept this evidence. He had, however, primarily been employed as a picker and was not experienced as a manager. He also had two other orchard properties, one of three acres and the other of four acres, both of which he was endeavouring to run at the same time as the plain tiff's property. While his personal ability as a picker was no doubt very good, the evidence showed that he was rushing from one property to another. He was absent a good deal from the plaintiff's property and he had simply taken on more than he

could cope with.

Considerable evidence was directed to the condition of the spraying machine which the defendant acquired from the plaintiff. It was contended that this was old and in poor condition, that it quickly became clogged with flakes of rust and that this indicated that the plaintiff had not himself been able to spray efficiently. Attention was also directed to the fact that some of the trees were densely wooded and that this required more careful spraying techniques. I am not able to attach any significance to this machine as assisting in a decision on this matter. It is unnecessary to deal with this aspect in any detail because the determining factor, in my opinion, is to be found in the fact that the plaintiff's crop had been consistently kept free from disease and that it was still for all practical purposes free from disease when the defendant took possession. This situation co could not have been achieved if the machine had been incapable of operating efficiently. I think the evidence shows no more than that the machine required regular cleaning and the plaintiff's evidence was that he himself did this.

The plaintiff's allegations extended also to the assertion that the defendant did not pick and present his fruit for sale properly but included fruit which was ripe with fruit which was not. Here again I need not go into the evidence in detail. I accept the evidence of the plaintiff and of Mr J.W. Butcher in particular, that the cases of fruit contained a mixture and included some which were small and unripe. There is some support for this conclusion in the evidence of Mr Ferguson who helped the defendant with his picking, and it is also in accordance with my assessment of the defendant himself. He was no doubt an experienced and capable picker and knew which fruit were ready for picking and which were not. Once he realised, however, that his crop was not being

going to be as profitable as he hoped, I believe that he concentrated his attention on stripping the trees as quickly as possible and getting a cash return as soon as he could. The defendant's evidence was that he was conscious of the fact that he owed money to a finance company which needed to be repaid. He said this by way of explanation for not having put fruit into cool store in order to get the advantage of higher prices later in the year but I think it reflects his attitude generally and is consistent with the impression of impetuosity which I formed of him.

The only remaining matter is as to whether the representation by the plaintiff of an estimated income of $12,000-15,000 was reasonably capable of achievement. This must be considered in the light of the evidence of the plaintiff's gross sales for the preceding four years which averaged $8,222. What he was estimating was substantially in excess of that.

Several witnesses gave evidence bearing on this. The plaintiff's land agent said that in his experience orchardists expect to average about $1,200 an acre for pip fruit and about $1,000 an acre for stone fruit. The plaintiff did not have many stone fruit and this evidence would tend to support a gross return in the vicinity of $12,000. Mr Cacciopoli, an experienced orchardist called for the defendant, who had not seen the plaintiff's orchard, said that an average orchard should yield about 1,000 cases to the acre. It was generally agreed that a fair average price would be $1.30 per case and this would indicate that a reasonable return for an average 10 acre orchard would be about $13,000. Mr H.L. Marshall, who had some experience of orchards, and who inspected the plaintiff's property in about November or December, 1969, with a view to leasing it, estimated that the crop should produce about 12,000 cases. At $1.30 per case that would amount to about $15,000.

His brother, Mr S.R. Marshall, who was an experienced orchardist and who also inspected the property in December, 1969, with a view to leasing it was more modest and estimated at least 10,000 cases, which again would indicate about $13,000. He regarded this, however, as an "on" year and therefore thought it could well yield more. There was general agreement among the witnesses that the plaintiff had a heavy crop in this year. Notwithstanding the relatively low returns of the plaintiff for earlier years, I think the evidence points clearly to the probability that, assuming spraying was properly done and the fruit properly picked and marketed, a gross income of between $12,000 and $15,000 could fairly have been expected. I have little doubt that this would have been achieved by an experienced and competent orchardist.

For the reasons I have given I consider the defence to this action must fail as ~~almost~~ also must the counterclaim. The defendant has admittedly not paid the balance of $3,500 under his contract and the plaintiff is accordingly entitled to judgment for that amount together with costs according to scale and disbursements and witnesses expenses to be fixed by the Regstrar. I certify for three extra days at $42 each. There will also be judgment for the plaintiff on the counter-claim but with no additional costs.

Solicitors: Messrs. Bannister and von Dadelszen, HASTINGS, for the plaintiff,

Messrs. W.S. Bramwell and Grossman, HASTINGS, for the defendant.