

No Special  
Consideration

BETWEEN LINCOLN VICTOR ADAIR  
Appellant

A N D GROUP PUBLICATIONS LIMITED  
Respondent

Hearing: 17 October 1978

Counsel: Knight for Appellant  
James for Respondent

Judgment: 26 FEB 1979

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JUDGMENT OF SOMERS J.

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This appeal was heard on 17 October 1978. The notes of the evidence given on the first day of hearing are notes made by the learned Magistrate himself. The evidence was in fact taken down in shorthand. The shorthand writer has left the service and declines to transcribe and no-one else can apparently do so. The Magistrate's note is not complete. It was not possible to rehear the case for the appellant is out of the jurisdiction. After the hearing I proffered an alternative course involving some delay. Counsel advised me at the end of January 1979 that I could get no further assistance. I must therefore do the best I can with the available material. Nothing I have written is intended as a criticism of the learned Magistrate. He needed nothing more than an attenuated note. He heard the evidence and could expect to have the shorthand note read back to him if necessary.

Group Publications Ltd, the plaintiff in the Court below and the respondent on the appeal engaged the defendant, the appellant in this Court, to sell advertising. It claimed to recover from the defendant \$1135 (particularised in the pleadings at \$1195 and amended at trial in some way to \$1135) which it averred had been collected by the defendant from persons to whom advertising had been sold. The defendant denied liability and counterclaimed for sums

totalling \$2475 of which \$165 was for commission and \$750 "recompense for additional services". The sum of \$165 was however described as a balance the defendant asserting in effect that \$670 of the plaintiff's claim was properly retained by him as commission.

The case was heard in the Magistrate's Court on 4 April and 9 May 1977. Judgment was delivered on 20 May 1977. After stating the nature of claim and counterclaim the learned Magistrate continued

"I have heard both Plaintiff's director Mr Sadler and the defendant in evidence at length. I formed a clear view that the Plaintiff's version of events was the more credible and I found the defendant more and more plausible as the case proceeded. On the balance of probabilities I hold that the plaintiff's claim is fair and at no stage was the defendant entitled to collect and retain advertising dues and have it paid to himself and his wife. I can see no merit in any part of the counter claim. The defendant was using his position to try to acquire a place in the business but as far as the plaintiff was concerned it did not advance beyond the discussion stage. The association was that of company and commission agent for the purposes of arranging advertising and I am sure the defendant knew the state of the business of the plaintiff and when publication was likely to cease. I am satisfied he was a substantial cause of the dissatisfaction of the clubs concerned as there was extensive unauthorised advertising some of which was paid for and commission paid to the defendant. Accordingly I find for the plaintiff, I am not prepared to award damages, on both claim and counter claim. The claim is in the sum of \$1135 with costs, disbursements and witnesses expenses to be fixed by the Registrar."

This case as I have indicated occupied two days. Evidence was given at length on both sides. By way of example the balance of the defendants evidence and that of his wife given on the second day and transcribed from the shorthand note cover twenty foolscap pages. The Court clerk's note indicates that there were at least 44 exhibits produced by or on behalf of the plaintiff (I say at least for the literal progression proceeds from AF to AL) and 25 on behalf of the defendant. In such circumstances I do not think that reasons so expressed are adequate.

The defendant appeals. Essentially three points were made by Mr Knight of counsel on his behalf.

The first was that the findings of the learned Magistrate as to credibility and probability were erroneous. The second and third points referred to specific items of \$240 part of the plaintiff's claim and \$508.10 part of the defendant's counterclaim the latter of which it was submitted the evidence showed was conceded by the plaintiff to be due to defendant. It will be convenient to refer to the specific items first for the errors said to be disclosed in relation to them are relied on, with other matters, as pointing to the inadequacies of the more general findings.

The sum of \$240 was claimed by the plaintiff in its amended statement of claim as having been obtained by the defendant from Billiards Wholesalers Ltd. The evidence for the plaintiff on the point given on the first day of hearing was that of the proprietor of that company to the effect that a cheque for \$240 was handed to the defendant. The note then continues "cross examined cheque - agreed not represented". It was apparently agreed that the defendant had never presented the cheque and it was in fact produced. There is no record of any evidence in chief or cross examination of plaintiff's manager who subsequently gave evidence or of defendant. Counsel were agreed the Magistrate was in error and that the claim for that sum had been abandoned at the hearing. Mr Knight however in his general attack on the judgment lays some emphasis on the learned Magistrate's failure to recollect the agreement of the parties or even to touch on the particular sum as it was affected by the evidence noted and the produced cheque.

The sum of \$508.10 is part of the amount cross claimed by the defendant. Mr Sadler, the director of the plaintiff, referred to it in his evidence in chief

"I have complied (sic) a list of unauthorised  
 "\$3400 - \$680 commission paid - I have not seen  
 "them all some did pay shown but not added -  
 "\$580.10 I have not paid in respect of subsequent  
 "publications. When defendant came back from  
 "United States he rang me about non-payment of  
 "commission to his pay on two magazines published

"plus two magazines not published, Christchurch  
"No. 6 and Richmond No. 3, the \$508.10 was in  
"relation to Christchurch No. 5, Woolston No. 6 ..."

In his cross examination the following passage occurs:

"... I told the defendant I was closing the business  
"down and I left with him the current accounts,  
"denies any authority for defendant to collect  
"amounts owing for advertising on account of what  
"is owing, I do not think I owe defendant on  
"Richmond Rambler No. 2, it was not published.  
"On or about two weeks before 24th I told  
"defendant the magazine was being stopped I concede  
"only \$508.10 unpaid ..."

The only exhibit mentioning that amount to which I was referred - and my researches have discovered no other - is Exhibit V. This may or may not be the list mentioned by Mr Sadler in his evidence in chief but it was obviously prepared and produced by him. The Exhibit makes it plain that the sum of \$508.10 is the total of 20% of the advertising in Christchurch 5 and Woolston 6 - the two subtotals appear in a column "commission due". The total carries the annotation "Not Paid". On the face of it that appears to be an admission by the plaintiff that such a sum had been earned or become payable and was not paid.

Mr James of counsel for the Company submitted that Exhibit V did not constitute an admission of liability and that the matter had been left to the Magistrate as one of credibility with resultant findings adverse to the defendant. But in the face of a document such as Exhibit V a generally stated preference on credibility does ~~hardly~~<sup>not</sup> suffice. Mr Knight submits that the learned Magistrate simply overlooked the matter.

I turn to the first point made by Mr Knight. In an appeal by way of rehearing upon the note of evidence the Court has the same right to come to a decision on questions of fact and law as the learned Magistrate. But this Court is an appellate court with the limitations in relation to matters of fact which necessarily follow. It is for the appellant to satisfy the Court that the decision is wrong. And where an issue of fact is determined upon

credibility it is necessary to recognise the great advantage the trial judge has had. But where, either because the reasons given are unsatisfactory or because it clearly appears from the evidence, the Court is satisfied the Magistrate has not taken advantage of having seen and heard the witnesses the matter becomes at large. To that there may be added the further reflection that a preference expressed by the Magistrate for one view of the primary facts as more probable ought not to be disturbed unless the other probabilities so outweigh that chosen that the latter can be said to be erroneous. Even in the case of inference I consider the inference drawn must be shown to be wrong.

Where then does the present case stand? The reasons expressed by the learned Magistrate are in my view inadequate. Essentially he has preferred the evidence of Mr Sadler to that of the defendant on the claim. In so concluding he has not expressly referred to the evidence of Mrs Adair nor to the documentary evidence. He has overlooked the agreed amount of \$240 and upon the evidence before me was in error in not allowing the counterclaim or set off in respect of the sum of \$508.10.

The proper course appears to me to be this. First to allow the appeal in respect of the sums of \$240 and \$508.10. Secondly to set aside the judgment in favour of the plaintiff in respect of the balance of its claim and remit that part of the case to the Magistrates Court for rehearing. Whether or not defendant can or will appear to defend is a matter for him. The judgment so far as it disallows the claims for damages by both plaintiff and defendant is in my view correct and indeed the contrary was not suggested. Both claims were hopeless. That part of the judgment will stand.

The respondent will pay the appellant his costs of the appeal which I fix at \$75 together with

disbursements for fees of Court and other necessary payments as fixed by the Registrar. The appellant's security is to be refunded.

*[Handwritten signature]*

Solicitors:

Knight, Johns & Co, Christchurch, for Appellant  
Saunders & Co, Christchurch, for Respondent

IN THE SUPREME COURT OF NEW ZEALAND  
CHRISTCHURCH REGISTRY

No. M.202/77

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Appellant

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