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IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

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No. M.34/83

1365

BETWEEN R.A. & B.H. McEWAN

Applicants

A N D G.L. & J.M. SMITH

First Respondent

A N D J.E. WATSON & COMPANY LTD

Second Respondent

Hearing: 7 November 1984

Counsel: A.M. Wilson for Applicants
J.B. Walker for Respondents

Judgment: 7 November 1984

ORAL JUDGMENT OF HOLLAND, J.

This is an appeal from part of a judgment given in the District Court at Invercargill on 14 February 1983 whereby the appellants were ordered to pay the sum of $2,500, being the purchase price of one Angora buck goat sold to them by the respondents. The District Court Judge ordered the appellants also to pay interest on that sum at 15% per annum from 1 August 1979 until 14 February 1983. The appeal is solely in respect of the judgment for interest.

It was a stale claim that came before the District Court Judge. It is now even older. There were many interlocutory proceedings including substitution and addition of plaintiffs and actions on behalf of the defendants joining a third party which in the circumstances was found to be unjustified. There were several statements of claim, but the final amended statement of claim that was before the District Court Judge in relation to its claim for interest said:-

> "5. It was a condition of the agreement for sale and purchase that the defendants would pay interest at the agent's current rate from the date of purchase if the purchase moneys were not paid within fourteen days. The current rate for the material period has been 15 per cent."

The defendants, who are now the appellants, did not file any specific pleadings to this allegation, but of course the notice of intention to defend denied that allegation.

On appeal the appellants have submitted that the sale was a private one between the appellants and the respondents in no way involving the agency of J.E. Watson & Company Ltd, a stock and station agent of Invercargill. The District Court Judge has found as a fact that the sale of the goat was through the agency of J.E. Watson & Company Ltd and that an account for the purchase price was forwarded by that company to the appellants. It was on an invoice of J.E. Watson and Company Ltd marked:-

> "Terms - nett cash. If not paid within fourteen days interest will be charged from the date of purchase."

The principal issue before the District Court Judge was essentially one of misrepresentation against the respondents and an allegation of negligence against the third party, J.E. Watson & Company Ltd. The District Court Judge found that there was no relevant misrepresentation and that there was no negligence on behalf of the third party. Although the plaintiff specifically claimed interest, it was no doubt not the major issue in contest before the District Court Judge. With respect to the District Court Judge, I am satisfied that he has not properly applied his mind to the evidence before him and the issues. I respectfully agree with him that this was a sale by the respondents to the appellants through the agency of J.E. Watson & Company Ltd.

That being the contract between the appellants and the respondents, it is necessary to ascertain what was involved from that.

The evidence called by the accountant from J.E. Watson & Company Ltd made it clear that that company accepted that it was a sale through its agency and on evidence of the sale it debited the appellants with the purchase price and it credited the respondents. The evidence is that some six months before the date of hearing in the District Court that credit was reversed. I am satisfied that the contract between the appellants and the respondents was one not at all uncommon between farmers relating to farm stock. It was essentially a private sale from the respondents to the appellants but through the agency of the stock and station firm with the consequences that the stock and station firm would debit the purchaser and pay out or credit the vendor almost immediately.

Counsel for the respondents admitted that the only ground on which interest could have been shown to have been part of the contract was on the basis that the contract was one involving the agency of J.E. Watson & Company Ltd. The evidence satisfies me that that contract did not attach to it interest payable to the vendor. Whatever the contractual relationship was between the appellants and the stock and station agency has not been established on the evidence. In the New Zealand scene it is perhaps common knowledge that a stock and station agency firm frequently acts for vendor and purchaser. It frequently charges commission to the vendor and it charges commission to the purchaser. It frequently does what it did here, and that is debit the purchaser and credit the vendor. There may well have been

circumstances from which a contract could be implied or expressed between the appellants and the stock and station agency firm whereby as a result of involving them in the contract with the respondents they were contractually bound to pay the stock and station agency firm interest for late payment. That simply is not established. It is not established whether the respondents' account with the stock and station agency firm was in credit or debit. It is not established whether that account attracted interest if in debit or earned interest if in credit and if so at what rate. It is clearly established that the practice of the stock and station agency firm was to charge interest to a defaulting purchaser at 15% per annum. But there is no evidence to indicate that it did that solely as agent for the vendor and that it would account to the vendor for the precise interest that it received. It is highly unlikely that such would have been the case and the absence of proving that to be the case means that the respondent as plaintiff failed to prove that interest payable to J.E. Watson & Company Ltd was in fact interest payable to that company solely as agent for the vendor.

I accordingly respectfully differ with the conclusion of the District Court Judge that this was a contract where it was shown that interest was payable by the purchaser to the vendor. There may in the circumstances have been some interest payable to the stock and station agency firm, but it would seem that they have lost any right they might have to claim that by having cancelled the credit which they allowed to the vendor. That simply does not arise in these proceedings. It may be, for instance, that the respondents have a right of action against the stock and station firm for not having

continued to credit the amount with them, if in fact as the stock and station agent firm maintains it is entitled to interest from a defaulting purchaser because it allows credit to a vendor. That also does not arise in these proceedings and is probably not likely to arise in any other because the principal partner of the respondents is in fact the stock manager of the stock and station agent firm. I mention this because the contractual relationship between farmers and stock and station firms is one that is frequently a matter of some ambiguity. It does not, however, exist to justify a claim for interest on this particular contract, and I am accordingly satisfied that the District Court Judge should not have awarded interest at 15% per annum in accordance with the contract.

There now calls for consideration the discretion to award interest under the Judicature Act. That is at a maximum of 11% per annum. The evidence shows that the respondents received credit for the amount from shortly after the sale in 1979 until October 1982. They were without that credit from that time until the date of the judgment. Were it not for the fact that the evidence showed that the stock and station agent firm had itself credited the respondents with a greater part of the period I should have been inclined to exercise my discretion to allow interest at 11% per annum from August 1979 until the date of the judgment. As, however, a credit was allowed, justice would seem to me to require that to be taken into account.

The appeal will be allowed. The provision for interest in the judgment will be cancelled and in lieu thereof will be a provision that the respondents shall have interest at 11% per annum from 22 October 1982 until 11 March 1983

which was the date on which the District Court Judge delivered his judgment. Although the appellants have succeeded in part I do not consider this an appropriate matter to award costs on the appeal and no costs will be allowed in respect of the appeal.

A D. Holland J