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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

NO. A.83/83

No Special Consideration

1008

BETWEEN KEVIN EDWIN McALLISTER

Plaintiff

A N D ENERGY RECOVERY SYSTEMS LIMITED

Defendant

Hearing: 30 April and 1 & 2 May 1984

Counsel: A.A.P. Willy & R.A. Campbell for Plaintiff
G.M. Brodie for Defendant

Judgment: 17 AUG 1984

JUDGMENT OF COOK J.

The plaintiff claims that, in or about June and July 1981, he negotiated with the defendant for the continued supply of wood shavings for a new incinerator which the latter was installing to provide heat and energy for the Lane Walker Rudkin factory in Christchurch; that, as a result, a contract was completed on or about 21st August 1981 (although dated 30th October 1981) for the supply of wood shavings at an agreed rate for a three year renewable term. While the allegation in the statement of claim is that the agreement, despite the October date, was to come into operation on 1st July 1981, the plaintiff accepted during the hearing that the earliest date from which he could claim was 1st November 1981.

Reference is made to the price at which the wood shavings were to be supplied and then the plaintiff goes on to allege that he arranged the sole rights to the supply of wood

shavings from timber mills around Christchurch to enable him to supply three loads per day of nine cubic metres each; that when, on or about 1st November 1981, the defendant varied his requirement to nine loads a day, the plaintiff arranged for the supply of sufficient wood shavings to fulfil that need.

It is then claimed that, in the event, the defendant was not able to take the supply of wood shavings and that the agreement was varied so that the defendant would pay to the plaintiff a subsidy totalling $17.50 per day from 1st November 1981 for three loads per day which the plaintiff was then uplifting from one of his suppliers; that in addition to the payment from the defendant the same supplier agreed to pay the plaintiff an amount of $17.50 per day for the removal of the shavings, pending the commission of the incinerator at the defendant's plant, so that the plaintiff was entitled to a total of $35.00 per day while other supplies of shavings, which the plaintiff had secured, were being carted by him at a cost of $21.90 for 12 cubic metres per load; that, as the defendant had refused to perform the contract as varied and because the arrangement reached with the defendant as varied was causing losses to the plaintiff, the plaintiff gave notice terminating the arrangement as at 31st January 1983. He claimed that at that date there was an amount of $2,460 owing by the defendant for subsidy payments and that, in addition, the plaintiff had suffered substantial special damages.

For the plaintiff, it was first submitted that the written agreement of 30th Ocotber 1981 is binding upon the parties because it was partly performed and because the defendant is estopped by its conduct from denying the existence and performance of the agreement; alternatively, that there exists a collateral agreement between the parties pursuant to which the defendant agreed with the plaintiff to take three loads and later nine loads of shavings per day in performance of the agreement. There are other submissions on the basis of other causes of action, but I set these aside meantime.

Background:

I turn first to the general background of the matter. The plaintiff was carrying on business as a cartage contractor with a licence to carry timber waste products. In 1981 his business was developing and it has since grown to a point where, according to his evidence, he has a monopoly. At that time, however, there was vigorous competition. He learnt that the defendant was proposing to instal a fluid bed boiler and might be looking for a supply of wood shavings. While that was one possible type of fuel, its use for that purpose had not been proved and the defendant was contemplating the use, not only of wood shavings, but also of coal and its parent company's waste products. The plaintiff made himself known to Mr Pocock, the managing director of the defendant company, in April or May 1981. According to the plaintiff, he asked Mr Pocock if the latter would consider entering into a contract as only a contract would be satisfactory to ensure a guaranteed supply. This idea was satisfactory to Mr Pocock and the plaintiff's solicitor then prepared a contract which was delivered to the defendant and received back signed. It seems that this was in July/August 1981. Correspondence shows that copies for execution were sent by the plaintiff's solicitor on 14th July 1981 and were returned under cover of a letter of 21st August. Apparently the date 30th October 1981 was inserted by the defendant as that was about the time it was anticipated that the new boiler would be able to commence operating and supplies of wood shavings be required.

Between July and the end of 1981 there were many discussions between the plaintiff and Mr Pocock as to the commencement of the plant. For a time the plaintiff was dumping wood shavings at his own cost. There continued to be delays as the company was facing unexpected problems. This situation continued throughout 1982 and the plaintiff received certain payments from the company to which reference will be made in detail later. Letters were written by his solicitor and it appears that no reply was ever received, though the evidence for the defendant indicates that a reply to a letter

of 1st September 1982 was prepared and was thought by the company to have been despatched. It appears that the burner never came into commission or certainly never burned waste material or wood shavings. When the payment he had been receiving towards the cost of dumping wood waste suddenly ceased about October 1982, the plaintiff spoke to Mr Pocock's successor as managing director of the defendant company and received the impression that the latter did not believe there was any sort of agreement in existence.

As part of his endeavour to ensure that an adequate supply of wood shavings should be available, the plaintiff had made arrangements, in particular with Addington Timber Company and Sydenham Timber Company; but while he spoke of it as an agreement in each case, he was ready to admit that it was a gentleman's agreement, not legally binding on either side, a view of the arrangement which was certainly confirmed by the managing director of Sydenham Timber Company.

In a letter written by his solicitor to the defendant company on 23rd December 1982, expressing concern at the situation, it is stated that the plaintiff could not continue the present arrangement without any prospect of recovering losses; that they were writing to advise the defendant that unless some satisfactory proposal for settling the matter was reached by 31st January 1983, the contract would be treated as at an end. As nothing further was heard from the defendant, the plaintiff acted accordingly.

Contract Document:

This is a formal document naming the parties and reciting that the defendant (referred to as "the customer") had requested the plaintiff (referred to as "the contractor") to provide a supply of shavings as fuel for the defendant's fuel bed boiler operated at its premises at 36 Orbell Street, Christchurch and that the contractor had agreed to do so on the basis set out. Clause 1 reads as follows:-

> "THE customer agrees to purchase and the contractor agrees to supply to the customer wood shavings as required subject only to them being available to the contractor at the time."

In clause 2, while the plaintiff undertakes to use his best endeavours to keep up a continuous supply of wood shavings as and when required, he is not to be responsible if, for any reason other than his own default in delivery, shavings are not available at any time from the suppliers. There is an undertaking by the defendant to purchase all its requirements from the plaintiff, but subject to the plaintiff being able to supply. The term of the agreement is expressed to be for three years from 1st July 1981 and to be renewable for successive periods of three years each thereafter, but with power to either party to give three months notice in writing cancelling the agreement. This is contained in clause 5 and how precisely that clause should be interpreted is not immediately clear, but this has no bearing on the present question. Clause 6 sets out the basis upon which the price will be set and there is a reservation in favour of the plaintiff whereby, should the various sawmills which supply the wood shavings make a charge for them, the defendant will pay that in addition.

As it stands, the agreement cannot be said to be a contract binding the plaintiff to supply and the defendant to take any particular quantity of wood shavings. No doubt, if the defendant had required a supply of any particular quantity, in the absence of anything further between them, the agreement would have been the basis upon which supply would have been made and paid for. I am unable to see that it can be said that the agreement had been partly performed by reason of the fact that the plaintiff had taken steps to secure a supply of wood shavings; performance, as I see it, would have required some supply of wood shavings to the defendant. Nor can I understand how it can be said that the defendant is estopped by its conduct from denying "the existence and performance" of the agreement. The written contract undoubtedly exists and the

defendant does not seek to deny that fact, but says that the agreement was merely one to purchase all the defendant's requirements of wood waste from the plaintiff, with the reservation in favour of the defendant, at all times, that it had the right to stipulate what those requirements from time to time might be; it would not be bound to take delivery until the actual requirement as determined by it actually arose and it placed an order for any particular load.

Collateral Contract:

The plaintiff further submits that there existed between the plaintiff and the defendant an agreement for the daily supply of initially three, and later nine, loads of shavings which was adopted by the defendant and partly performed by both parties in that the sources of supply were arranged for the benefit of the defendant but, in the long run, to the financial detriment of the plaintiff. The submission continues that, in those circumstances, whatever the defendant now says it intended by the agreement of 30th October 1981 or whatever it says, as a matter of construction, the agreement originally meant, having regard to the conduct of the parties, that the defendant is now estopped from denying that it was an agreement for the supply of three, and later nine, loads of wood shavings in terms of the financial formula set out in the agreement.

This introduces new factors; basically, whether there was agreement between the parties that the plaintiff would supply and the defendant would take, first, three loads per day and subsequently, nine loads per day, and the evidence in this respect must be examined. The plaintiff says that in the early stages he had discussed three nine cubic metre truck loads every day, a figure which arose on Mr Pocock's estimation of his requirements. He was never quite certain whether it was to be five or six days a week but he says that he understood it to be a minimum of five days a week. He says, further, that the figure of nine loads of nine cubic metres per day came after further discussion with Mr Pocock, a discussion

which was about September or October of 1981. When cross-examined, he maintained that from the outset he had been prepared to deal with Mr Pocock only if they could enter into a fixed commitment for a set amount of shavings a day. He said that there was some doubt as to what the ceiling might be and that later they had discussed nine loads. He had distinctly been given the impression in his earlier discussions with Mr Pocock that there would be a minimum requirement of three loads per day but he accepted that the written agreement, which, of course, was prepared after those discussions, did not impose any minimum requirement. When asked at what date Mr Pocock said that the company would require three loads a day, he said that at that time there was no specific date and he agreed that the defendant's representative did not say precisely that they would take all of the boiler's requirements from him, that is the requirements for fuel generally as opposed to wood shavings. When speaking in more detail of the requirement of nine loads per day, he said this occurred prior to November and seem to have arisen out of a discussion with the man installing the boiler when they agreed that 27 cubic metres of shavings per day was quite inadequate. He said:-

> "So I discussed this with Mr Pocock and this is the reason why there was not a specific volume stated in the contract. We believed that nine loads per day was more likely to be the figure and in fact could have been more and I said I could supply regardless. This was towards November 1981. Did Mr Pocock give you an order for nine loads per day? No, he did not. He asked if I would be able to supply nine loads per day. Did he tell you it was going to require nine loads per day? The actual figure of nine was bandied around. I was under the impression nine loads per day was the minimum. What, is he seriously giving you an estimated minimum requirement that he was going to be taking from you this amount or was it just discussion on it? It was a discussion of anticipated levels. Did he on or about the 1st November say to you, please start delivering to me nine loads of saw dust per day? No. It was never said? Not as such, no."

Mr Pocock, on the other hand, could not agree that

he gave a commitment to take any quantity. That was when they were first discussing the matter. He said that he gave a commitment that the company would take their wood waste requirements from the plaintiff and described it as a verbal agreement then. He said that the only commitment that he could remember was that as soon as they got going they would need a couple of weeks to settle the system down and then they would look at seeing what their requirements would be and then would come to some financial arrangement as to how many loads had to be delivered; that they had discussed possible amounts that could be used, not possible amounts that would be used. He stressed the difference between could and would. When cross-examined in relation to the three and nine loads, and the manner in which the plaintiff might have come by those figures, he was asked whether he could recall the context in which he had given those figures to the plaintiff and he replied that he had believed that any discussions between them concerning quantities were always on the basis that this is what would happen, "if one or other or something else happened", and it was never in his mind that those would be the exact figures that would be used.

I do not doubt the sincerity of either witness. I think the plaintiff may have been carried away to some extent by enthusiasm to develop his business and Mr Pocock may have been over optimistic as to the potentialities of the fluid bed boiler, but I am unable to conclude that there was any binding arrangement between them that any particular quantity of wood shavings was in fact to be supplied by the plaintiff and received by the defendant. When the first discussions were held, Mr Pocock could not have known how the fluid bed system would work and what fuel would in fact be used in it. The agreement was prepared on the plaintiff's instructions and, had a firm quantity been decided during the earlier discussions which preceded its preparation, I cannot but think that he would have included something to that effect. I have no doubt that each anticipated, or that Pocock hoped and the plaintiff anticipated, that a day would come when the company would

require a supply, but that is a very different thing.

The plaintiff cannot succeed on the grounds that there was a breach on the part of the defendant of the written agreement, or that there was a collateral agreement that, upon the basis set out in the written contract, certain quantities would be supplied by the plaintiff and taken by the defendant.

Other Causes of Action:

In his final submissions, made in writing, Mr Willy, for the plaintiff, included a plea that the defendant was, at all material times, under a duty of care to the plaintiff not to mislead him into believing that the boiler would be commissioned imminently and that the defendant therefore had an imminent need for shavings; that acting upon such beliefs, the plaintiff, to the defendant's knowledge, continued to retain sources of supply which were uneconomic in order to be able to service his contract with the defendant. There is nothing in the pleadings to indicate a cause of action founded on tort. References in the statement of claim are solely to the effect that contracts were entered into and that the defendant refused or failed to perform contracts between it and the plaintiff. The hearing was conducted entirely on that basis and no reference was made in Mr Willy's opening to any basis other than contract upon which the plaintiff might succeed. Understandably, Mr Brodie objects to any consideration of liability on other grounds and I regard his objection as justified. I would only add that, in any event, I would not be satisfied on the evidence that the defendant was in breach of any duty to the plaintiff. It seems that, through Mr Pocock, the defendant endeavoured to estimate as fairly as it could what its requirements might be and there is nothing to indicate that he was negligent in that respect; as to the starting time for the boiler, it was known to the plaintiff that the project was experimental and different fuels were in contemplation as appropriate. I see this rather as a situation where both parties were acting in good faith, the

plaintiff anxious to build up his business and probably taking more from the information given him than was warranted in the circumstances; on the other, Mr Pocock for the defendant, anxious to get the new boiler into operation, but not able to say what the outcome would in fact be or what fuel would prove the best to use.

Finally, the plaintiff argues that, if he cannot succeed on the causes of action mentioned, he should be entitled to do so on a claim of quantum meruit. This also was not predicted by the pleadings, or the conduct of the hearing. In any event, I am able to see that such claim could succeed. According to the submissions on behalf of the plaintiff, his claim in this respect is based upon the following facts:-

(a) That there existed at all times a contractual nexus between the parties.

(b) the plaintiff did do work for the defendant and did incur expense in so doing, such work being for the benefit of the defendant and encouraged by it.

I am unable to see, however, that the plaintiff did work for the defendant pursuant to the contract. There was no obligation upon him to secure supply of wood shavings. Indeed, the contract protected him in the event of a supply not being available at any time. As to the references in the submissions to his commercial probity being placed in jeopardy, with his livelihood drawn exclusively from the business of disposing of waste products, such jeopardy arising as a direct consequence of the contractual arrangements entered into between him and the defendant, I am unable to see that any risk he may have elected to run in that respect can be relied upon as a basis for a claim. Whatever problems he may have encountered in 1982, it seems that he was determined to control the disposal of waste products from sawmills and, according to his own evidence, he has achieved a monopoly in this field.

Subsidy Payments:

So far as the taking from sawmills of wood waste and dumping is concerned, that is the subject of the other portion of the claim for damages; he was paid in part by the defendant for the dumping he undertook and the question remains whether he was entitled to the further amount mentioned in the statement of claim.

There it is alleged:-

> "THAT in addition to the payment from the Defendant to the Plaintiff, the Addington Timber Company also agreed to pay to the Plaintiff an amount of $17.50 per day for the removal of the said shavings pending the commissioning of the incinerator at the Defendant's plant making a total payment to the Plaintiff of $35.00 per day whilst other supplies of shavings which the Plaintiff had secured were being carted by the Plaintiff at a cost of $21.90 per 12 cubic metres per load which was a cost only basis."

The evidence certainly does not bear out the claim that there was agreement to pay to the plaintiff an amount of $17.50 per day. It is clear that there was an arrangement between the parties to pay what the plaintiff referred to as a subsidy towards the cost of the dumping. The plaintiff says that when, at the end of October 1981 the boiler was not ready for operation, he discussed the situation with Mr Pocock and the latter agreed to make a partial payment for what the plaintiff thought would only be a short period and in relation to the shavings available at Addington Timber Company. He then received payment in part from that company and a certain amount from the defendant. He said that he continued to accept delivery of shavings from his various sources during 1982 and that the defendant continued to make payments of this nature to him. He maintained that the total payments he received from the two sources, i.e. from the sawmill and the defendant, were not sufficient to defray all costs of carting and dumping. A series of invoices and accounts were submitted to the defendant and paid until an invoice dated 1st October 1982 was not paid, no explanation being given. He continued in the same way

debiting the defendant but with the same result until, as already mentioned, he managed to contact Mr Pocock's successor in January 1983 and found that the latter did not believe there was any sort of agreement in existence.

Mr Pocock accepted that he had agreed to pay a 50/50 share of the dumping charges. He said he was aware that it was hard for the plaintiff with the delay in getting the plant going. He did not think he had a legal obligation to pay but appears to have appreciated that it might have made some difference if the particular source of supply were lost. Mr Wood, the secretary of the company, confirmed that Mr Pocock had told him that he had agreed to make payments to the plaintiff as he was involved in the dumping cost for the wood waste. Mr Wood said that, while he could not remember the period during which the payments were made, he accepted that they were made through to some time in 1982 and then stopped; the succeeding managing director stopped the payments, he believed, because he considered there was not a commitment for the company to make them. While he thought that the plaintiff had been advised, he had no personal knowledge of that and I am not satisfied that any advice was conveyed to the plaintiff.

In a letter written by the plaintiff's solicitor on 1st September 1982, mention is made of the subsidy for dumping material as a contribution towards running costs. While it appears that a reply to this letter may have been prepared, it is in very general terms and there is strong doubt that it ever reached the plaintiff or his adviser. The latter's letter of 23rd December contains the statement that previous correspondence addressed to the defendant and personal approaches to the secretary had, by and large, remained unanswered. Even if the letter was received, however, it did not contain a statement that the subsidy payments would be stopped.

From the records produced, it is clear that the company made payments in respect of wood shavings dumped during

the months November 1981 through to August 1982, the payment in each case being based on the number of loads taken from Addington Timber Company's mills with different rates for loads from Yaldhurst and from town. Statement sent in respect of the months September 1982 to January 1983, apparently making charges on the same basis as the previous months, were ignored by the defendant. Mr Brodie submitted that the arrangements were entirely consistent with a gratuitous promise by Mr Pocock to make some payment in order to assist the plaintiff to retain what the latter had represented as a source of supply that might otherwise be jeopardised. I cannot accept it as gratuitous, however. To my mind there was an agreement between the parties and it is a fair inference that, had the defendant not agreed to make such a payment, the plaintiff would have taken other action. The accounts accepted and paid by the defendant show the basis upon which payment was made and, if it was not defined precisely when the plaintiff and Mr Pocock discussed the arrangement, the defendant can hardly dispute the basis after paying for so many months. I would not be prepared to find (should it have been necessary) that the arrangement was to continue until the defendant required a regular supply and I consider that it could have been determined by either party on reasonable notice. The defendant did not give notice of determination, however, but merely stopped paying and that was not enough to quit itself of liability.

Judgment:

I consider the plaintiff is entitled to recover the amount claimed under this heading. There is judgment for the plaintiff in the sum of $2,460, together with interest from 31st January 1982 to the date of judgment at the prescribed rate of 11%. The plaintiff is entitled also to costs according to scale with disbursements as fixed by the Registrar.

Solicitors:
B.J. Drake & McGillivray, Christchurch, for Plaintiff
Anthony Polson & Co., Christchurch, for Defendant.