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IN THE HIGH COURT OF NEW ZEALAND — A. 976/81

AUCKLAND REGISTRY

BETWEEN NORTHERN TOOLS LIMITED

PLAINTIFF

A N D PRODUCT VENDORS LIMITED

FIRST DEFENDANT

A N D DAVID ROBERT CRUMP

SECOND DEFENDANT

Judgment: 26 October 1984

Hearing: 23, 24, 25 October 1984.

Counsel: G. V. Hubble for Plaintiff
I. F. Williams and Miss Davenport for Defendants

ORAL JUDGMENT OF CASEY J.

The Plaintiff in this action, Northern Tools Limited, is a firm of tool makers. The evidence of a principal Mr Scheidegger, disclosed that it was of considerable experience in this field, and it sues Product Vendors Limited (the First Defendant) for $15,713.91 for 902 mechanisms for vending machines which it made and supplied in pursuance of a contract which it alleged was partly oral and partly written, delivery being effected over March and April of 1981 The total price for the machines was $26,061 of which 200 were charged at $25 and the balance at $30 each, and from that total was deducted the sum of $846.09, being the cost of air-freighting certain of them to and from Australia for modification. Payments on account of $9,500 were made by the Defendant, yielding the total being claimed. There was also a claim against the Second Defendant (Mr Crump) under a guarantee which was incorportated in a written contract for the sale of machines made on 10th November 1980.

Mr Crump was a Director and principal in the First Defendant's firm, along with his fellow Director, Mr Gibson. That company, as its name implies, was concerned with the installation of, and supply of contents to vending machines and (as I understand it) the business substantially (if not exclusively) involved the sale of pre-pasted tooth brushes through these appliances, located in various parts of New Zealand. An integral part of the machines was the vending mechanism itself which received coins and then actuated the release mechanism for the product. At the time we are concerned with in this action, local machines had been fitted with a hand-made mechanism which was relatively expensive and had been designed to take 30 and 40 cent contributions. Of concern to Mr Crump and Mr Gibson was the price and delivery dates for their supply from the existing manufacturer.

Through a friend, Mr Gibson was introduced to Mr Scheidegger. There were discussions between them, and the latter made a study of the problem and indicated that his company could produce a tooled mechanism superior to that being already supplied, at a cost of $30 per unit. This was acceptable to the First Defendant, and following further discussion in which the Directors intimated that they were not in a position to make any substantial payment at that stage, a simple written contract was drawn up by their solicitors for the supply of 600 (which I will now call the Mark 1 type mechanisms), 200 being at $25 and the balance at $30 per unit.

There was a guarantee incorporated in this document and signed by Messrs Gibson and Crump. The latter was a man of some substance who had disposed of a freight-forwarding business and had then been involved as a franchise holder in the North Island for these vending machines from the company which was then run by Messrs Gibson and Darley. In late October of 1980 (according to his evidence) he became interested enough to buy out Mr Darley and invested a substantial sum of his own in it. Both he and Mr Gibson described themselves as essentially salesman, with no mechanical knowledge enabling them to talk with any authority about the details of the mechanism required for the machines.

Mr Scheidegger says there was talk about one component in the unit called a washer catcher, whose function was apparently (as its name implies) to detect and remove washers and other foreign objects from the actual denominations needed to operate the machines. Mr Scheidegger had a note on the initial memorandum he produced indicating that it was not needed. There was a dispute about this. Mr Gibson, who conducted these earlier negotiations, intimated that the point, as far as he recollected, did not arise in this way at all. I don't see it as being particularly relevant to the problems before me in this case, except perhaps as to credibility and reliability of evidence. And in that respect I accept the witnesses on each side struck me as men who were telling the truth, as they remembered it after some four years. The fraility of human recollection must, of course, be borne in mind in such a situation when people in good faith are trying to recall conversations and events which they had no particular reason to remember at the time. Also to be taken into account is the ordinary human failing leading the recollection of events to become coloured by the point of view of the particular party describing it. Inevitably there will be inaccuracies and inconsistencies in their evidence, but I am not prepared to find that witnesses on either side were deliberately misrepresenting the position.

Following these discussions and the arrangements being made for the production of the machines, tooling up for them took a period of some six to eight weeks on the part of Mr Scheidegger's company. Mr Gibson visited Australia in November, returning towards the end of that month. While there, he had surveyed the undertaking of a major operator in this field called Throne Products, which was vending similar items at a cost of 20 cents each, and it had come to the conclusion that the business was becoming uneconomic because the individual sale items were costing something like 23 cents to place into the machines. Mr Gibson realised that there was a chance to move in and secure a very profitable existing market, if the machines being used by Throne could be converted to mechanisms designed to take 40 cents. They were currently equipped with two types, one of them manufactured in the United States and the other in Italy, each of them designed to take 20-cent Australian pieces.

He brought back samples of these mechanisms and another one from a horoscope vending machine. Apparently nothing further developed on that. But there was certainly an intense interest in discovering whether the tooth-brush vending mechanisms could be altered, and a discussion took place with Mr Scheidegger about 4th December, at which he undertook an enquiry and feasibility study. He reported back that the existing machines themselves could not be modified to take two 20 cent coins, but he could make up new mechanisms at a cost of $30 each which could be simply replaced by the operators on the existing vending machines. However, he would not be able to incorporate the washer catcher, which was a part of these mechanisms and I accept the evidence from Messrs Crump and Gibson that he came up with an alternative that he said would be as effective as the existing units, if not an improvement upon them.

There was a general discussion between the parties about the Australian proposition, and I have no doubt Mr Scheidegger knew what these machines were intended for and was given an overall picture of the scope of the intended operation. I also accept their evidence that the New Zealand operation involving the Mark 1 machine was agreed to be put to one side, while everybody concentrated on the development and production of the replacement unit for the

Australian machines which they called (and I adopt) the Mark II and Mark III, depending on their Italian or American origin. Mr Crump said in his evidence that when they were discussing the deferral of the New Zealand operation Mr Scheidegger informed him that they had only done the drawings required for tooling up and there would be no trouble about this. On the other hand, Mr Scheidegger says at this stage he had incurred substantial expenses in preparing the necessary tools for the Mark I operation, but he was prepared to put this aside on the basis that if it wasn't proceeded with he could - as he called it - amortise the cost in the recoveries from the anticipated flood of orders that it was hoped would develop from the Australian operation. Eventually, there was an order placed for 900 machines of the Mark II and III variety. The existing contract they had for the Mark I units provided for a delivery date of 60 days from the order and for full delivery by 1st February 1981. Mr Scheidegger stated the obvious, that he required longer to adapt his operation to produce the Mark II and III, but he said that once the tooling machines had been set up, then it would not take very long to produce the actual mechanisms themselves. I am satisfied from the evidence, which seems to be consistent with the dates discussed in relation to the Mark I operation, that delivery was to take place by the middle or end of February at the latest.

They were to cost $30 each as had been estimated by Mr Scheidegger, but there was no written contract entered into for these machines in the same way that occurred with the earlier order; nor was there any discussion about the guarantee from Messrs Crump and Gibson. As a result of these arrangements Mr Gibson returned and negotiated with the Australian company, eventually signing a contract to purchase its assets for $124,000 Australian involving a deposit of some $30,000. To do this Messrs Crump and Gibson incorporated an Australian company, Kellaway Proprietary, which was intended to be the vehicle owning Australian assets under the contract there, and administering the business at that end. This subsidiary acquired an interest in some 1,400 vending machines owned or operated by the vendor company in various parts of Australia, either as its own property, or which had been sold to independent franchise holders who would purchase from it the tooth-brush units to keep them supplied. The plan was (as I have indicated) to sell these operators the replacement mechanisms, and for the subsidiary to replace them in its own machines. Product Vendors did not anticipate any substantial profit from the resale of the mechanisms in this way. From what I have said, it will be apparent that the principal income in such an operation derived from the sale of the products used to stock the machines. This, of course, was the major attraction for Messrs Crump and Gibson to move into the Australian market in this way. They stated that before embarking on the operation they prepared a careful budget and discussed it with their accountants, and the cash flow calculations were based on their being able to take over and start installing the replacement mechanisms on 1st March, consistently with the delivery date of the machines being manufactured by the Plaintiff company for them.

Mr Crump at the Auckland end associated himself very closely with the progress of work at the Plaintiff's Albany factory, while Mr Gibson remained in Australia looking after that end, contacting various franchise holders and promising them early delivery of the machines, and that these would be capable of doubling the return from the units. Undoubtedly, as he intimated, it was important from the point of view of goodwill and the smooth running of the operation, and the meeting of their commitments to the vendor company, that the anticipated delivery times be closely adhered to. They acknowledged and accepted that there would be some buyer resistance to the higher price, and calculated their cash flow on the basis of a 30% drop in sales, which still gave them a profitable operation.

Mr Crump said that he became concerned at times with the progress being made in the production of the machines by the Plaintiff, and received assurances that everything was under control, but eventually it was not until 23rd March that the first delivery was received of 128 Mark II machines. He said that they appeared to be in order and were duly sent to Australia. But subsequent deliveries of Mark III models proved to be faulty. All 902 machines comprising the full order were delivered by 13th April 1981. The Mark III's were sent back for modification and were finally returned to Australia on 1st May. One of the Defendants' complaints is the effect that these late deliveries had on the anticipated cash flow.

The mechanisms were sold by Product Vendors to the Kellaway company at the Australian dollar equivalent of the New Zealand dollar cost, so that the only profit to the former was the exchange difference. I understand that the mechanisms were also supplied by the Kellaway company at that figure to the various franchise holders in the Commonwealth, who came from areas as diverse as Darwin and Perth. The Kellaway company operated machines on its own account in Brisbane, the Gold Coast, New South Wales and Victoria. According to the estimates given by Mr Crump, it had 500 machines of its own and 400 were operated by various franchise holders. The replacement mechanisms were supplied to the latter first in order (as Mr Gibson said) to keep faith with them. It will be apparent that these inter-locking marketing arrangements present problems in the ascertaining and assessment of appropriate damages.

Shortly after the mechanisms were installed on the vending units, complaints started to come in. There were problems them jamming and with security. It was found that some of them could be operated without inserting coins. I accept the Defendants' evidence that it took some time for the full implications of these problems to be realised. That evidence satisfies me first of all there was pilfering of the machines due to the absence of the washer catcher. It was not appreciated at the time its removal was decided that it served a dual purpose, not only of preventing the entry of unauthorised coins and objects, but also of preventing access to the working parts controlling the rotation of the coin holder. By the simple insertion of a piece of wire or a paper clip this could be disengaged and the release handle freely revolved. But the more serious problems were with jamming and these arose out of premature wear and faulty design. After listening to Messrs Crump and Gibson I am quite satisfied that because of those reasons the whole operation ended up in the disastrous fashion which they described. It suffices to say that by September they were unable to recover sufficient income to keep up their payments to the vendor They were involved increasingly in trying to keep faith with their customers and maintain their own operation by makeshift repairs and cannibalisation of stock units to keep those in position going.

Eventually the vendor repossessed and the whole Australian operation ground to a halt. Although the Kellaway company is still in existence it is only nominally in business.

I have no doubt that the drop in revenue from the higher prices must have played a part in the falling income, but I accept the evidence from the Defendants that in situations where they were able to monitor the returns, the drop did not exceed the 30% anticipated. Product Vendors had paid the Plaintiff $5,000 on account of the new machines in December 1980 and there were conflicting reasons for this. Mr Scheidegger says it was paid to help him with expenses already incurred in tooling up for this added production line. Mr Crump denies this and said that he was simply approached by him just prior to Christmas holidays, stating that he was unable to meet the full holiday pay for his workers and asking for an advance. Whatever the reason, the amount was paid and probably nothing much turns on it, but Mr Crump says that as a result it was agreed that the payment for the first 200 of the machines delivered would be reduced to $25, this being in line with the arrangements that had been made in the contract for the Mark I New Zealand products. The Defendant company also made two further payments, one of $2,500 in April and one of $2,000 in June. As I have said, on the invoices submitted by the Plaintiff, there was an allowance of $846.09 for the cost it undertook to meet for freight on remedying of the defects discovered in the Mark III units.

Following the complaints Mr Crump went across to Australia and said he was there for some time making a thorough investigation, and as a result he came back with 17 mechanisms which he described as a representative sample of the defects. These were handed to Mr Scheidegger at the end of July and discussions took place about them. He was first of all prepared to rectify all defects discovered and indeed did so on these particular items. He says they were never uplifted or removed from his premises by Mr Crump. As the complaints kept coming in I accept the latter's evidence that he started to realise that commercially it would be quite impracticable to have Mr Scheidegger undertake inspection and repair of all the mechanisms involved and I have no doubt that when the problem was pointed out to him, the latter also came to the same conclusion. The upshot was a conference between solicitors after there had been inconclusive negotiations and talks between the parties. The Plaintiff refused to accept responsibility for the design faults which by then had become manifest and undertook to remedy them only at the Defendant's expense. The cost of doing this, would have been commercially prohibitive. It involved re-tooling to make and fit the washer catcher, as well as the cost of recovering the defective units from Australia, sending them to New Zealand and then returning them for reinstalment. I am satisfied that the wear problems in the units, and the running repairs they needed so frequently made them commercially unacceptable.

All this leads me to the conclusion that the warranty of merchantable quality of these units (which Mr Hubble concedes must be implied in this situation) was not complied with. The evidence points to the fact that the prototypes they replaced enjoyed trouble-free operation for the greater part of their life in the units in which they were installed. It must be borne in mind that Mr Scheidegger in the discussions (and particularly in one of the letters from the solicitors when these problems had surfaced) maintained that the mechanisms he produced were at least as good, if not better, than the ones they replaced. So far as the question of merchantable quality is concerned, I refer to the comments of Lord Wright in Grant v. The Australian Knitting Mills (1936) A.C. p. 100 where he said this:-

> "Merchantable does not mean the thing is saleable in the market simply because it looks alright. It is not merchantable if it has defects unfitting it for its only proper use but not apparent on ordinary examination."

And that, I think, fairly applies to the situation of these mechanisms.

The fact that the goods were examined does not exclude such a warranty if the defects were not discoverable on reasonable inspection at the time. I refer to Mr Hubble's submission that the question of whether or not they were of merchantable quality must be decided by reference to the nature of the contract and all the surrounding circumstances. The ability to operate these machines without coins was due to the absence of the washer catcher, the full function of which was not appreciated by either party. The jamming was due to a combination of (a) the extra wear on the coin holder designed and made by the Plaintiff, due to the reception of two coins instead of the one which had been the case with the mechanisms it replaced; (b) the resulting extra wear on the pawls and springs of the mechanism; and (c) the design fault involving an excessive clearance of the back plate allowing coins to slide over each other and preventing the coin holder from rotating.

Mr Scheidegger maintained that he was not an expert in coin mechanisms and that he had no time to carry out tests which would have revealed these faults. But there is no doubt in my mind that he held himself out as an efficient tool maker, qualified to design and produce such mechanisms, and he did not make any of the reservations or qualifications about his experience that he stated in Court. He undertook to produce machines that would do the job and Messrs Crump and Gibson reasonably relied on his expertise and entrusted this task to him. In these circumstances, I am satisfied that he must be responsible for the consequences of these mechanisms not being able to meet the task required of them and which he fully understood. The result of these defects was an escalating problem over the sales of the First Defendant's product, resulting in failure to meet the commitments to the Australian vendor. It cancelled; Kellaway lost its deposit, and eventually the whole vending scheme in Australia collapsed.

There were a number of matters raised by way of counterclaim and set-off, which I will deal with briefly. The first one Mr Williams put forward was that the First Defendant had rejected the mechanisms. This is based on the proposition that the latent defects were not discoverable on reasonable examination. This question of examination is covered in s. 36 of the Sale of Goods Act, which provides that where goods are delivered to a buyer which he has not previously examined, then he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract. And s. 37 states:-

> "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them or, except where s. 36 of this Act otherwise provides, when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them."

There is a general discussion by Richmond J. on the buyer's rights to reject goods in Hammer & Barrow v. Coca Cola (1962) NZLR 723. It is quite clear to me that the First Defendant did not reject or attempt to return the goods. Instead, it sold them on to the Australian subsidiary which in turn seems to have sold about half to various franchise holders all over the country, and set about installing others in its own vending machines. This made it quite impractical to return the mechanisms, either by way of rejection or for repair, as the Plaintiff requested the Defendant to do at one stage. This effectively answers Mr Hubble's contention that in declining this offer the Defendant failed to mitigate its loss. After Mr Crump had brought back the samples and the extent of the faults was seen, I am satisfied that Mr Scheidegger himself recognised the futility of trying to patch them up, and it was then that he changed his stance and eventually said he would only modify them at the Defendant's expense. As I have already commented, this was commercially quite impractical.

Mr Williams treated Mr Scheidegger's refusal to accept responsibility as a repudiation entitling the Defendant to rescind. With respect, I think this is an artificial view of the matter. Looking at the position overall, Mr Crump had been involved in the assembly of some of these machines; he knew as much about their working as could be reasonably expected of a purchaser. Urgency precluded any lengthy testing and I think it was accepted by both sides, that the brief checks carried out on the first 120 (which appeared to work properly) would be sufficient.

I therefore find that delivery was taken on this basis, and that there was no repudiation of the contract (which by then had been completed) by Mr Scheidegger's refusal to take further action to rectify the position. After delivery in this way, the Defendant company must be taken to be relying only on the warranty to which I have referred.

It also raised the delay in delivery which I found was fixed for the end of February, and I am satisfied, that late delivery affected the budget projections. I think this can be taken as a factor in what happened, but its effect was virtually altogether overtaken by the problems with the defective mechanism and design. There were further claims based on misrepresentation; but essentially I see this as a case revolving around the breach of warranty which I have found. I regard Messrs Gibson and Crump as credible witnesses on the main essentials, and I certainly reject the proposition that their complaints were raised at the last moment to avoid payment, in the face of their realisation that for other reasons altogether the Australian operation was not going to be viable.

Under the Sale of Goods Act the measure of damages for breach of warranty is treated in s.54. It is prima facie the difference in value between what it was at the time of delivery and what it would have been if the goods had answered the warranty. The position here, (as I have already noted) is complicated by the marketing arrangements. The fact is that Product Vendors has not been paid anything by the Australian company. But there is very little evidence of what happened in Australia. I accept the overall picture that the mechanisms supplied very quickly proved themselves useless for the job they were supposed to do. But Counsel was not able to give me much help in determining just what the situation was there.

I am satisfied on the totality of the evidence from Messrs Crump and Gibson that the consignment must have had some residual value. The main problem was quite clearly the rapid wear of the components, which occurred at such a rate that it became commercially impossible to maintain the operation on the scale at which it had been proposed, even though some could be kept going. Indeed, the evidence was that there was still a franchise holder or two, with about 18 in operation altogether. But to maintain the large turnovers that were obviously expected in the main centres, clearly required so much attention to replacement of defective and faulty parts,.that it eventually resulted in the Defendant Company's Directors reaching the only commercial conclusion possible and abandoning the operation. There is the difficulty that the Australian and New Zealand companies were inter-locked with the same Directors. It seems very probable that the former company did sell and instal a considerable number of units and must have received payment for them from the franchise holders. But because of the decision taken by the common Directorate not to make any payment to the New Zealand company, it recovered nothing.

I think it would be quite inappropriate to approach the question on this simplistic basis and give no credit at all to the Plaintiff for whatever commercial value the consignment actually had. Mr Crump gave some indication of this when he suggested that only about one-seventh of the mechanisms could be used. I am not satisfied that this is a particularly accurate calculation and I do not think Mr Crump put it forward as one either. But I must take into account to the credit of the Plaintiff the fact that there was some value in these units. Many of them could have been and were sold and were installed and operated for a period in Australia, and produced profits. Product Vendors could have received some payment at least if it had insisted and if the two companies had been operating at arm's length. The complaints did not start to come in any volume until some little time after the units had been sold and installed.

I can only make an approximation here in an attempt to do justice to the parties, but giving the matter the best consideration I can in the light of the evidence I have heard, I am prepared to fix a residual value in the equipment at one-third, equivalent to 300 of the mechanisms at $30, which comes to $9,000, which I think would have been a fair value for the whole of the consignment. Product Vendors is entitled, therefore, to set up the resulting loss of value of the machines in diminution of the price. It received $9,500, therefore the Plaintiff has been overpaid by $500.

The Defendant is also able under subsection (4) to claim for further consequential damage. Here the counterclaim and set-off assesses this loss under four heads. First of all the sum of $2,634 for shipping and customs payments on the extra tooth-brushes sent to Australia to meet claims by vendors in respect of pilfering from the machines which, as I have said, can be directly attributable to failure to provide the washer-catcher, forming part of the breach of merchantable quality. There is very little offered in supporting proof of this claim from the Australian end. I had produced as exhibits appropriate freight and customs documents. I note that there is no charge for the actual tooth-brushes themselves. I think I must make an allowance here for mistaken or exaggerated claims on the part of the Australian connections and I allow $2,000 under that head.

There is a claim for loss of profits on sale of the mechanisms, which is totalled at $6,492.16 and results from the somewhat complicated calculation of the difference in exchange rates. I accept the arithmetical accuracy but in view of my finding of the residual value of the machines supplied, this must be reduced correspondingly. This claim should be looked at in the light of the First Defendant obtaining a profit on 300 of the machines and I therefore reduced it proportionally to $4,300. That Defendant also claimed $9,500 refund of the monies it paid on account of the machines. In view of what I have already said about the residual value the overpayment was only $500 and could be recovered from the Plaintiff as money had and received. Finally, there is a claim expressed in general terms for $5,000 for expenses incurred by the First Defendant as a result of Mr Crump's trips to Australia and his accommodation there in an attempt to sort out the difficulties. This matter understandably came before me in a very vague sort of fashion, and other business was undertaken on these visits as well. While I accept that Mr Crump was confronted with a totally frustrating situation and that he must have been involved in travelling and accommodation expenses, I have really been left in an area of speculation over how much. There were, I imagine, records available in Auckland to indicate the number of trips that might have been necessary and what proportion of them would have been occupied in this particular business. It is accepted that I have a general discretion. In fairness I think some allowance must be made to the Defendant company for the inevitable expense and travelling involved in dealing with these problems and I am prepared to fix a figure of $2,500 under this heading.

The total of these amounts allowed by way of counterclaim and set-off is $9,300 which can be set against the $9,000 allowed to the Plaintiff. In overall terms there would be a balance of $300 to the Defendant. As the $9,000 has already been paid to the Plaintiff the net result must therefore be judgment for $9,300 for the First Defendant against the Plaintiff.

I now turn to deal with the claim involving Mr Crump's guarantee, although in the light of the decision I have reached on the claim in general, this now appears to be of no relevance. However I think it is appropriate that I should mention it, in view of the argument addressed to me. It is accepted that it must be in writing. Mr Hubble submitted that the form of contract of 10th November was varied by written evidence appearing in a letter marked as being received on 9th July as No. 27 in Exhibit 1. In it Mr Crump recited events leading up to the placing of the orders for the Mark II and III machines and said they were to be delivered at the end of February 1981 "in substitution of the original order for 600". He points to the fact that payment for them was eventually the same - $25 for the first 200 and $30 for the balance, and there was no deposit. It is his view that the effect of this arrangement evidenced in this letter is that one can simply rule a line through the figure of 600 in the contract and alter it and the delivery times, so that the guarantee would still enure to cover that part of the contract as altered.

There could be several views of the new arrangements made between the parties. I think it is clear that they envisaged proceeding with the New Zealand part of the operation, with the manufacture of the Mark I mechinisms, but in view of the situation which developed with Australia, they decided (not surprisingly) to concentrate on the prospects that market offered first, and the New Zealand end was left in abeyance. There is evidence that an order for 500 local Mark I mechanisms was mentioned in February 1981. Mr Crump also said the position of the Defendant company had quite drastically changed as a result of his involvement with it at the end of October and his substantial injection of capital, so that the situation which called for the personal guarantees in the earlier transaction did not exist at the time of the new arrangements. I find his view of the matter not particularly clear on the evidence I heard.

I think that the Mark II and III arrangements could be most appropriately regarded as a separate contract from that relating to the Mark I machines, though made on the same terms. The real question is what the parties intented about the guarantee, determined by the language they used in that document in the light of the surrounding circumstances. My study of its wording indiciates that their intention was for it to apply only to the Mark I machines contemplated at the time the contract was signed. It refers to payment of the purchase price of the 600 units "hereinafter referred to". Mr Hubble conceded that it could not apply to more than 600 units, which seems to be inconsistent with his view that the simple alteration of the numbers would be effective to alter the obligations under the guarantee. The other point discussed with him - to which 600 does it apply? - emphasises the difficulty of reading it in the way he contends. I therefore find that the guarantee was limited to the original order, and this view of the matter seems to be consistent with the fact that it was never discussed or referred to in the negotiations leading up to the Mark II and III contracts. I take Mr Crump's letter as no more than a layman's account of what had happened, equivocal in its terms and capable of referring just as easily to a new concurrent contract. There will accordingly be judgment for him on that part of the claim, though in the event he would not have been liable.

There was a claim for interest advanced by the Defendant. I have given this some thought. Certainly the Plaintiff has had $9,000 which, under a timely set-off arrangement, it would not have been entitled to. A party is entitled to interest as compensation for having to remain out of its money and I can see no reason why that general rule should not be applied here. The result is unfortunate for Mr Scheidegger's company, but this was a business venture, and having given the assurances that I find were present in this case, he must accept responsibility for the consequences of their failure. Mr Williams acknowledged that there could be problems in fixing a date from which interest should run. I incline to his view that it would be appropriate to select as a mean the commencing date of 28th July 1981. There will accordingly be judgment for the First Defendant against Northern Tools Limited for the sum of $9,300 together with interest at 11 per cent until the date of this judgment.

On the question of costs, the Plaintiff has succeeded on its claim to the extent of $9,000 insofar as it was faced with the defence of rejection or repudiation, which could have resulted in it being unable to recover anything. The Defendant also succeeded on its defence, to the claim for the full price, obtaining a substantial diminution, and was also able to satisfy me on the counterclaim and set-off. The First Defendant will have scale costs on the judgment with disbursements and witnesses expenses to be fixed, and I note that this will include Mr Gibson's reasonable travelling and accommodation expenses as a witness. I also certify for one extra day. So far as Mr Crump is concerned he was successful in his defence but the main burden was borne by the First Defendant. As a result there is in fact no liability on him. The issue of the guarantee was a comparatively minor one, having regard to the overall issues and I think it appropriate to allow him $500 costs against the Plaintiff, together with any disbursements. There will be judgment for him accordingly.

McCasey J.

Solicitors:

Holmden Horrocks & Co., Auckland, for Plaintiff
Shieff Angland Dew & Co., Auckland, for Defendants