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IN THE HIGH COURT OF NEW ZEALAND  
CHRISTCHURCH REGISTRY

A.439/78

870

BETWEEN

TERENCE BERNARD RYAN of  
Christchurch, Retailer,  
formerly trading as  
Hornby Pharmacy (1969)  
Limited whose registered  
office is situated at  
Christchurch

First Named Plaintiff

A N D

ELGIN LINTON LIMITED  
whose registered office  
is situated at Christ-  
church

Second Named Plaintiff

A N D

IAN WALTER HARKESS of  
Christchurch, Pharmacist

First Named Defendant

A N D

HORNBY PHARMACY (1976)  
LIMITED whose registered  
office is situated at  
208 Oxford Terrace,  
Christchurch

Second Named Defendant

Hearing: 4 April 1984

Counsel: D.I. Jones for Plaintiffs  
J. Cadenhead for Defendants

Judgment: 23 MAY 1984

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JUDGMENT OF ROPER J.

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By their amended Statement of Claim the Plaintiffs  
claimed a total of \$377,122 under 16 different heads as the  
total sum allegedly owing following the sale in 1976 of a

pharmacy to Mr Harkess as trustee for a company to be formed (the Second Defendant). By July 1979 the Defendants had paid \$94,500 on account, including interest of \$4,500.

On the 26th March 1982 an order was made by consent that accounts be taken between the parties before Mr R.A. Anderson, a Chartered Accountant, to establish the amount, if any, payable by the Defendants under most of the heads of claim, and the following matters were left for determination by the Court:-

1. The liability of the Defendants to pay general damages of \$100,000 to Mr Ryan personally.

2. Whether there was a liability to pay an additional sum of \$25,000 as goodwill in addition to the agreed goodwill of \$25,000.

3. Whether the stocktake and valuation of fittings and fixtures had been carried out in a proper manner. It was Mr Ryan who alleged otherwise.

The Court hearing occupied four days and by my judgment of the 30th April 1982 I held that Mr Ryan's claim for general damages of \$100,000 failed completely; that there was no obligation on the Defendants to pay an additional \$25,000 as goodwill; and that the valuations had been carried out in a proper manner and were binding on the parties (subject to a minor enquiry left to Mr Anderson).

Through oversight the question of whether the Defendants were liable to pay for stock in excess of \$50,000 was not left for the Court's decision but to aid Mr Anderson I expressed my views upon it. After reviewing the evidence I concluded that there had been a variation of the original agreement whereby Mr Harkess agreed to pay for excess stock.

Mr Anderson has now completed his enquiry and made his report to the Court. His task has not been an easy one. He has calculated that the final balance owing to the Plaintiffs on the heads of claim left for his determination is \$167,218 and that payments by the Defendants on account total \$146,500 as at the 31st October 1983.

I am now required to settle two issues - costs and interest.

As for costs, the Plaintiffs failed on all issues left for the Court's decision apart from the matter of excess stock, but as against that it is clear from the correspondence that Mr Harkess' failure or refusal to come to grips with the matters in dispute and their resolution added greatly to the burden of preparation. With a measure of goodwill on both sides and a less mercenary approach by Mr Ryan this dispute could have been resolved in a much shorter time than the eight years it has taken. There were manifest faults on both sides. It would be quite inappropriate to fix costs on the basis that the Plaintiffs failed on a claim for general damages of \$100,000. It was a hopeless claim and occupied little of the hearing time. The Defendants are entitled to an award but a comparatively modest one in the circumstances.

The Defendants are awarded costs of \$2,000 (all in).

As for interest, Mr Anderson has calculated the sum payable as \$103,091 but that is at 12% on a compound basis which Counsel are agreed is not appropriate.

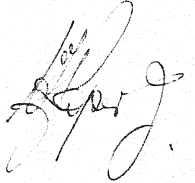
Mr Jones submitted that Mr Anderson should be asked to recalculate interest on a simple interest basis as from the 31st October 1976, which was his starting date for the compound

calculation. He further submitted that the interest should be at 12% on \$75,000 of the balance due until its repayment because of a provision in the agreement between the parties concerning a debenture for that sum at that rate, and at 11%, being the rate under the Judicature Act, for the balance and for the remaining period. In fact no debenture was ever presented and Mr Harkess' progress payments had exceeded \$75,000 by March 1977. I propose to ignore the provision regarding a debenture.

Mr Cadenhead argued that interest should only run from the time the various heads of claim were formulated or pleaded, and particularly stressed this submission as it related to the inter-shop trading account which was not specifically pleaded until January 1981. He referred to the case of Tauranga Harbour Board v. Clark & Others [1971] N.Z.L.R. 197 where the Court of Appeal held that it had not been the practice to award interest under the Judicature Act for the whole of the period between the date when the cause of action arose and the date of judgment, although it was competent for the Court so to do. I agree with Mr Jones that that case, which concerned a claim under the Deaths by Accidents Compensation Act 1952, is of no help in the present enquiry. Mr Harkess had the pharmacy and the stock, and for a period was receiving cash takings to which the Plaintiffs were entitled. Furthermore he owed the Plaintiffs a considerable sum on the inter-shop trading business. Mr Ryan has been out of his money but in part because of his own uncompromising stand.

To cut the Gordian knot and reach a result which I believe will do justice between the parties, I make the following order as to interest. The Defendants are to pay simple interest at 11% on the amount from time to time outstanding, such interest to commence on the 1st January 1977 and on the amount outstanding at that time. The timing of liabilities arising for the purpose of calculating the interest is to be as set forth in Schedule A to Mr Anderson's report.

Leave is reserved to the parties and Mr Anderson to apply for further directions if the proposed formula is deficient in any respect.

A handwritten signature in dark ink, appearing to be 'R. J.', with a large flourish extending downwards and to the right. The signature is written over a faint, illegible stamp or text.

Solicitors:

Purnell, Creighton, Newman & Co., Christchurch, for Plaintiffs  
Clark, Boyce & Co., Christchurch, for Defendants