18/6

(3) X

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.413/83

NZLR 655

BETWEEN ALISTER TAYLOR of Russell, Publisher

Appellant

AND ROSE YOUNG of Hamilton, Researcher

Respondent

Hearing: 31st May, 1984

Counsel: Hodgson for Appellant
Doogue for Respondent

Judgment: 13-6-84

JUDGMENT OF SINCLAIR, J.

This appeal concerns a contract which was entered into between the Appellant and the Respondent wherein the Appellant was to be the publisher of a book while the Respondent was the author of a section of that book which has been titled "G. F. Von Tempsky: Artist and Adventurer".

The District Court was concerned with an interpretation of portion of Clause 11(a) of the contract which provided for payment of the Author's fee. The total fee was $15,000 and the contract acknowledged that $2,000 had already been paid as at its date, namely 3rd February 1982, and it was the provision in relation to the second payment which fell to the Ccurt for determination. The portion of Clause 11(a) which was under consideration is as follows:

> "A further sum of Five Thousand Dollars ($5,000) will be paid by the publisher upon arrival of the bulk stock of the book...."

The District Court found in favour of the Respondent and it is in respect of that judgment that the present appeal is brought.

The contract provided that the edition of the book was to be limited to 1,250 copies and the publisher had full control over the production, printing and publication of the book without any reference to the Respondent at all.

Subsequent to the contract and, as I ascertain it, about May 1982, 500 books arrived in New Zealand from Japan where they had been printed, but as at the date of the hearing of the appeal it was accepted by both parties that no further copies of the book had been imported into New Zealand. It was the Appellant's contention that before the $5,000 became payable to the Respondent more than half of the 1,250 copies earlier referred to had to arrive in New Zealand. It was the Appellant's contention that the phrase "the bulk stock" had only one meaning and that was that it meant more than half of the number of the copies of the book which was referred to in the contract.

The Respondent's argument, quite naturally, was that the arrival in New Zealand of the 500 copies meant that bulk stock had arrived and that in consequence payment was due.

It is to be noted immediately that the word "bulk" in the contract is used as an adjective and not as a noun. In fact it appears to be a curious use of the word and to my mind it cannot be equated with a phrase such as "the bulk of the stock". If that phrase had been used then in my view there would have been really but one interpretation available

and it would have been the interpretation for which the Appellant now contends.

In support of the Appellant's argument reliance was had upon two cases: the first case is Bromley v. Tryon (1952) A.C. 265. That case concerned the interpretation to be given to a shifting clause in a will which was expressed to operate should any of the issue of a named person become entitled to a specified settled estate "or the bulk thereof". The phrase in inverted commas was held in the context of the document then under consideration to méan anything over one half. The second case was Royse Stead & Co. v. McDonald & Miller (1887) 4 N.Z.L.R. 342. That case is one in which the facts are not set forth, but obviously related to the sale and delivery of a certain number of pigs. In the course of the judgment reference was made to the meaning of the word "bulk"; the Court stated that in its view it meant more than the greater part and was rather equivalent to nearly the whole. Unfortunately the context in which the word was used does not appear from the report at all and I find that case to be of little value. Indeed, even the decision in Bromley v. Tryon appears to me to be of little assistance as in that case the word "bulk" was used as a noun and in an entirely different context from that which appears in the present contract.

When one has a look at the contract one notices immediately that the contract was stated to be in respect of an edition "limited to 1,250 copies", which to my mind fixed a maximum number of copies which was to be the subject of this particular contract, and no minimum number of copies was specified at all. Thus the Appellant being the publisher, and having full

control over the production, publication and printing of the work, could determine how many copies he would order to be printed from time to time. It may well have been in the Appellant's mind to test the market because the price of the book to the public was high indeed, as is evidenced from a statement appearing in one of the exhibits produced, namely that the pre publication price was $595. At that price there may well have been a limited market and one could understand the publisher testing it before deciding to have the whole number of copies printed. As I have already stated, the control of the printing was entirely in the hands of the publisher and the Respondent had no authority or power to intervene in that direction at all.

It is little wonder, therefore, in my view that when 500 copies of the book were due to arrive in New Zealand the Respondent sought to obtain payment of the $5,000 which by clause 23 of the Contract was required to be paid to one Ray Richards, a literary agent of Auckland.

Thus, in my view the meaning of the phrase "the bulk stock" in the context of this contract is as was contended for by the Respondent, namely that it was stock which arrived in volume. Indeed, it was that volume of stock which went to one particular retailer for sale so that he had the bulk stock of the book in his store for sale and distribution. Such an interpretation does not do violence to what was envisaged by the contract, remembering that one part of that contract was a provision to provide for payment of the Author's fee.

Further, I repeat that it must be remembered that the

publisher himself had complete control over the printing and publication of the work and if the interpretation for which he contends is to be applied it simply means that by his own actions he could test out the market and if it were unfavourable defeat the rights of the Respondent.

By interpreting the phrase in the way I have it enables a distinction to be made between copies of the book arriving in quantity as against advance copies or sample copies. In any event it seems to me that the interpretation which I accept as being correct is the one which in fact the parties intended themselves.

Mr Richards as the agent of the Respondent had been writing to the Appellant concerning the payment of the $5,000. On the 3rd May, 1982 a letter was written by that firm to Mr Richards in the following terms:

> "Re ROSE YOUNG
>
> This is to confirm our telephone conversation re Rose's contract. I can confirm we will have the $5000 (due on arrival of first shipment) paid direct to you from Hedleys. I notice you say April and I would never have indicated the books would be here in April. We had hoped May but, according to the shipping details it may even be June. However, I enclose a copy of an invoice to Hedleys (please - this is confidential). You will note that this amount is due 16 June and we have authorised that $5000 of this be paid direct to you."

"Hedleys"referred to in the letter was the name of the firm which was going to sell and distribute the book. The plain reading of that letter confirms in my view that the parties intended the payment of $5,000 to be made when a stock of the books in quantity or volume arrived in New Zealand.

In the circumstances there is no necessity to resort to any other devices for construing the contract as in my view the phrase is not ambiguous at all.

Accordingly the appeal is dismissed with costs to the Respondent in the sum of $250 and any necessary disbursements.

P.D.J.

SOLICITORS:

Macalister, Mazengarb, Parkin & Rose, Wellington for Appellant

McCaw, Smith & Arcus, Hamilton for Respondent