

BETWEEN ROMANS STORE LIMITED

an incorporated  
company having its  
registered office at  
Katikati, Trader

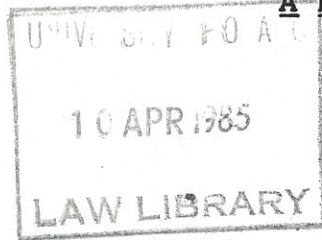
Plaintiff

A N D

WILDERBOER-SCHUT LIMITED

an incorporated company  
having its registered  
office at Hamilton,  
Shop Proprietor

Defendant



Counsel: J.C.D. Corry for Plaintiff  
No Appearance for Defendant

Hearing and  
Judgment: 10 December 1984

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ORAL JUDGMENT OF GALLEN J.

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This is an action for damages brought by the plaintiff against the defendant based upon a warranty contained in an agreement for sale and purchase of a business which was entered into on 9 April 1981. The warranty is to the effect that the turnover of the business had attained not less than \$17,800 p.w. for a period of 6 months immediately preceding the date of execution of the agreement.

The plaintiff company was unable to obtain such a turnover and was unable in fact, even by making economies, to earn a sufficient sum from the weekly takings of the business to meet the commitments which it had undertaken. Ultimately, the business was taken over by the receiver and sold and the plaintiff now seeks damages as a result of an alleged breach of warranty. The defendant has taken no steps in the matter and the plaintiff has called formal proof of the matters in issue today. Specifically the defendant has not contested the allegations of breach of warranty so that the matter falls to be determined on the basis of a calculation of damages.

The plaintiff seeks first, the receiver's costs. Since the agreement contemplated that the plaintiff would be borrowing by way of second debenture from the defendant, it must have been in the contemplation of the parties that the plaintiff would need to borrow reasonably substantial sums in order to finance the purchase. I think therefore, it may properly be said to have been foreseeable that if the business was unable to meet the commitments undertaken, that a receivership was a definite possibility. Under those circumstances, I think the sum claimed is properly claimable and there will be judgment for the sum of \$7,791.00 under that head.

The plaintiff also seeks to recover what is described as a capital loss. When the business was originally purchased, Mr Tsyrlin gave evidence that the goodwill element

of the purchase price was calculated in relation to turnover. The sum now claimed represents the difference between the amount which was paid by way of goodwill on the original purchase and the amount which was recovered by the receiver's forced sale, which amounts to \$29,500 and there will accordingly be judgment for that sum under that head.

The plaintiff also seeks to recover expenses incurred in connection with obtaining finance relating to the purchase of the business. The total sum for legal expenses and other associated expenses under this head amounts to \$5,386.52 and there will be judgment for that sum under that head.

The plaintiff also seeks loss of profit. In dealing with this and the subsequent claim for future loss of profit, it is important to bear in mind the danger of doubling up the damages which are claimed. Mr Corry drew my attention to authority which for obvious reasons indicates that it is improper for any doubling up to occur. Where expenses are claimed then, there is obviously often enough a possible element of doubling up where damages for loss of profit are also claimed and there is authority to the effect that in such circumstances, the plaintiff is required to elect as to which of the two heads of damages he proceeds under. There is also authority however to the effect that such an election may not be required where the loss of profits which are contemplated are such that the expenses which were incurred were in relation

not only to the initial period, but to a subsequent period and designed to ensure a loss of profits for the future. I accept that in such circumstances, it is proper to claim under both heads.

In this case, the plaintiff claims on loss based on what he could have expected to earn if the warranty as to turnover had been correct. On that basis, over the period that the business operated, the actual loss has been calculated at \$20,416 and there will be judgment for that sum under that head.

The plaintiff also seeks damages for future profits for the period beyond that in which the business actually operated. I think such a claim is in these circumstances reasonable. The question is for what period it may properly be considered. The plaintiff has given evidence that on the basis of the warranty which was given and the budgetary material which has been produced in evidence, he could have been expected to dispose of the indebtedness of the company within a period of 2-3 years. I think in the circumstances it is not unreasonable to assume that a loss would have continued beyond the period during which the business operated for a period of 2 years and I take into account the evidence from Mr Tsyrlin which suggested he liked the area where the business operated and decided to reside there on an indeterminate basis. The amount claimed under this head is \$20,000. The calculations to which Mr Corry has referred would suggest the loss of

profits over the period might have been very substantially greater than this and under the circumstances, I think the figure is reasonable and there will be judgment for this sum under this head.

There will therefore be judgment as set out above, together with costs to scale and disbursements set by the Registrar.

In the claim, the plaintiff properly refers to \$25,000 which was borrowed by the plaintiff from the defendant. There must be a set-off to this extent in respect of the amount claimed. In the circumstances, I should be reluctant to add interest.

*TRG [Signature]*

Solicitors for Plaintiff: Messrs Keesing, McLeod and Company,  
Lower Hutt

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