IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A. No. 253/80

BETWEEN ADAMS MARKETING LIMITED a company duly incorporated in New Zealand and carrying on business at 290 Wakefield Street, Wellington, New Zealand and elsewhere as a merchant

Plaintiff

A N D LYNDSAY G. MULHOLLAND of 39 Marywil Crescent, Auckland, Merchant

First Defendant

A N D KIS (AUSTRALIA) PTY LIMITED a company duly incorporated in the State of New South Wales, Australia and carrying on business at 5 Erith Street, Botany in the said State and elsewhere as merchants

Second Defendant

A N D KIS FRANCE a Society Anonyme organized under the laws of France and carrying on business at 47 Avenue Marie Reynoard, Grenoble, France and elsewhere as manufacturers and merchants

Third Defendant

Hearing: 21 September 1984

Counsel: A.A.T. Ellis Q.C. for Plaintiff
C.J. Booth for First Defendant
J.C. Corry for Second Defendant

Judgment: 5 October 1984

SUPPLEMENTARY JUDGMENT OF QUILLIAM J

In the judgment delivered in this case on 8 June 1984 leave was reserved to apply further in certain respects and there have been other matters which have needed to be resolved. Having heard counsel on them I now deal with these matters in turn.

1. Second Counsel

The plaintiff has asked for costs for second counsel at $200 for each of five days but this has not been agreed to.

Although the principle as to a Queen's Counsel having a junior has been changed it is still the case that in an action of any size it will be a reasonable course for a silk to have the assistance of a junior. This was an action which came into that category. In addition, it was an action which, in its earlier stages, involved matters of copyright and trade mark law. Senior counsel accordingly had the assistance of a junior who practised in that specialist field. Although those matters did not require attention during the hearing it was not unreasonable for the same junior to be involved.

I certify for second counsel as claimed.

2. First Defendant's Costs

Any question of possible liability by the first defendant to the plaintiff was resolved at an early stage in this litigation. The first defendant was joined at a time when the plaintiff believed that its exclusive contract with the second defendant had been wrongfully terminated and when it appeared that the first defendant was about to deal in

the second defendant's goods in breach of that contract and in breach of rights of copyright and trade mark which the plaintiff claimed to hold. In those circumstances it was not unreasonable that the first defendant should have been joined. In the result it became apparent that the plaintiff had no good cause of action against the first defendant and so it was acknowledged that the action would not be pursued against the first defendant. This meant that the plaintiff was liable to meet the first defendant's costs and that is not contested.

Now, however, having obtained a judgment against the second defendant, the plaintiff seeks an order for payment by the second defendant of the first defendant's costs on the basis either of a Bullock or Sanderson order. The second defendant's response is that the joinder of the first defendant was not its responsibility and did not arise out of anything done by the second defendant.

The costs of the first defendant which are in issue are those which related to the interim injunction proceedings. These were intended to restrain the first defendant from dealing in the key-cutting machines in breach of the exclusive agreement between the plaintiff and the second defendant, from infringing the plaintiff's alleged copyright and from taking advantage of information provided by the plaintiff to the second defendant. Although the issue as to copyright never had to be tried it seems unlikely that there ever was a basis for an allegation of infringement against either the first or second defendant and so no liability for the first defendant's costs should fall on the second defendant in that regard. The real question concerns whether it was the actions or conduct of the second defendant in wrongfully terminating the contract which reasonably required the plaintiff to join the first defendant. At the outset the plaintiff could not be

expected to have known the true position about this. It was aware that the second defendant was appointing the first defendant as its agent; it believed (correctly as it turned out) that this was in breach of the contract; and it felt obliged to take steps to prevent the parties from pursuing a course which would damage the plaintiff.

I consider the second defendant must accept the responsibility for a course of conduct which required the plaintiff to spread its net rather wider than later was found to be necessary. There will accordingly be an order for the second defendant to pay the first defendant's costs. The amount of those costs has not been agreed upon but relating the matter as best I can to the scale and to the amount potentially in dispute I fix those costs at $500, together with reasonable travelling and accommodation expenses for the first defendant in travelling to Wellington for the hearing of the interim injunction.

3. Payment Into Court

There will be, by consent, an order for payment out to the plaintiff's solicitors of the money paid into Court, that sum to be held by them on interest-bearing trust deposit for three months with leave reserved to the second defendant to apply within that period for terms to be imposed. Thereafter the solicitors are to be free to disburse the money.

4. Interest

In the course of my judgment I raised some queries about the claims for interest. These were matters which had not really been the subject of argument at the

hearing and perhaps could not have been until the basis of the award of damages was known. I have now heard counsel on these matters.

The claim for interest is twofold. First it is said that, on the basis upon which liability has been held to exist, there has been a loss by reason of the inability of the plaintiff to sell six machines over a period of three months ending on 22 July 1980. The notional proceeds of sale of those machines was $37,192 and so interest had to be paid on that sum to the bank at 17-3/4%. This continued until 31 October 1981 at which date the overdraft was repaid. Interest is therefore sought on $37,192 at 17-3/4% from 22 July 1980 to 31 October 1981. Thereafter the claim for interest is upon the basis that $37,192 would have been available to invest and that upon the basis of the evidence it could have been invested at 15% from 1 November 1981 to 31 March 1982 and at 12% from 1 April 1982 to 30 April 1984.

The answer offered to those claims is, first, that damages were awarded on the basis of loss of opportunity to sell machines rather than on the basis of any loss in respect of the machines themselves. It was accordingly said that the finding was not equivalent to one of wrongfully keeping the plaintiff out of the proceeds of sale of the machines because the plaintiff still has the machines and that the effect of the plaintiff's present claim would be to charge the second defendant with the depreciation on the machines which have since reduced in value. It was then argued that in any event there could be no basis for allowing interest at more than 11% (in accordance with s 87 of the Judicature Act 1908) as from the date of repayment of the overdraft since to do so would be to award interest by way of damages.

So far as the first claim is concerned, namely, for loss of interest until repayment of the overdraft, it is

necessary to observe the basis upon which damages have been awarded. Although that basis is a theoretical one (that is, an estimated selling price of an estimated number of machines reduced by an estimate of value now), nevertheless it must be translated into a calculation of actual loss. Notwithstanding that the plaintiff still has those machines, this is incidental to the way in which the damages had to be assessed. It is simply a recognition of the fact that the machines have not been sold and still have a value. Accordingly it was necessary to give the second defendant credit for that value. This does not alter the fact that the notional proceeds of sale did not go into the plaintiff's bank account and that there was a resulting loss

It was contended that the plaintiff, in still retaining the machines, has failed to mitigate its loss and that interest ought not to be payable for three years or more. It is unfortunate at this stage to be asked to make a further finding of fact but I think the evidence is available to enable me to do so. That evidence was that the plaintiff set out to quit its remaining stock and has simply been unsuccessful in doing so. The details of the sales actually made are set out at p 22 of the judgment. It is undoubted that efforts were being made to achieve sales. Whatever the position as to liability it would have been surprising to find that the plaintiff was content to hold the remaining machines if sales could have been obtained, and I can see nothing in the evidence to suggest that the lack of sales was the result of inaction or indifference.

What has happened is that credit has been given for the value, as at the date of hearing, of the six machines which might have been sold because they did, in fact, exist. It may well have been argued that although those machines existed and had a value the continued inability to sell them meant that they may never be sold and

that the damages ought to have been higher. I do not suggest that any such argument was properly available to th plaintiff but it is a consideration which needs to be taken into account in answer to the submission that the second defendant has had to bear the impact of depreciation.

The result is that while the measure of damages must be arrived at by giving credit for the remaining value in the machines, the calculation of loss of interest must b made on the basis of the actual additional interest which would have been paid. If the six machines had been sold within the three month period then the amount by which the overdraft would have been reduced would have been the total of those sales and not that amount less some reduction base on a valuation at a subsequent date. I accordingly hold that the plaintiff is entitled to interest on $37,192 from 15 July 1980 to 31 October 1981, namely, $8,968.

The view I have expressed is, I think, in accordance with the decision of the Court of Appeal in Wadsworth v Lydall [1981] 2 All ER 401. That was a case in which two men were farming in partnership on a property owned by the defendant. When the defendant wished to sell his property the parties agreed to a dissolution of partnership in consideration of the defendant paying ten thousand pounds to the plaintiff in return for vacant possession of the property. In anticipation of receiving that money the plaintiff agreed to purchase another property and to pay a deposit of ten thousand pounds. The defendant failed to pay as agreed and the plaintiff had to borrow on mortgage in order to meet his deposit. In the various sums claimed by the plaintiff there was an amount for interest paid on the mortgage. In delivering the principal judgment Brightman LJ said, at p 405:

> " In my view the damage claimed by the plaintiff was not too remote. It is

> clearly to be inferred from the evidence that the defendant well knew at the time of the negotiation of the contract of January 1976 that the plaintiff would need to acquire another farm or smallholding as his home and his business, and that he would be dependent on the 10,000 Pounds payable under the contract in order to finance that purchase. The defendant knew or ought to have known that if the 10,000 Pounds was not paid to him the plaintiff would need to borrow an equivalent amount or would have to pay interest to his vendor or would need to secure financial accommodation in some other way. The plaintiff's loss in my opinion is such that it may reasonably be supposed that it would have been in the contemplation of the parties as a serious possibility had their attention been directed to the consequences of a breach of contract. "

The basis upon which that observation was expressed has received the approval of the House of Lords in the recent case of President of India v La Pintada Cia Navegacion SA [1984] 2 All ER 773 at p 787.

The present case is not precisely the same as Wadsworth v Lydall but I think there is a clear analogy and that the need for the plaintiff to meet interest on an overdraft account was a foreseeable consequence of the second defendant's default.

There remains the question of the rate of interest which should be paid as from the date of repayment of the overdraft. The plaintiff's claim is based upon the rate which would have been available to the plaintiff in the ordinary course of investment and there was evidence as to what that could have been. I think, however, the plaintiff is here on less firm ground. Whether the plaintiff would indeed have invested the money in the way envisaged is a matter of speculation and the fact that investments at the

rates claimed may have been available is not in itself any basis for allowing interest at those rates.

There is, I think, no doubt that the plaintiff is entitled to an award of interest under s 87 of the Judicature Act but not at any greater rate than is there prescribed.

In the result there will be judgment for the plaintiff for interest on $37,192 from 15 July 1980 to 31 October 1981 at 17-3/4%, namely, $8,968, and from 1 November 1981 to 30 April 1984 at 11%. I leave it to counsel to make the latter calculation.

I understand all other matters, including costs, have been agreed upon.

Solicitors: Jeffries Partners, WELLINGTON, for Plaintiff

Williams, Donald & Co., AUCKLAND, for First Defendant

John G. Swan, WELLINGTON, for Second Defendant