IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.660/83

BETWEEN ACTO ENGINEERING LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as Engineers

Plaintiff

A N D CHEMOIL MACHINERY LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as Machinery Suppliers

Defendant

Hearing: 24, 25 October 1984

Counsel: M C Black for plaintiff
M W Vickerman for defendant

Judgment: 9th November 1984

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JUDGMENT OF HENRY J.

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This action concerns the purchase by the Plaintiff (Acto) from the Defendant (Chemoil) of two automatic lathes. In early 1980 Acto was requiring for its purposes as a manufacturer of automotive and agricultural products an automatic lathe for sheep shearing machinery manufacture. The desired machine was to have what was described as an automatic bar feed unit, which because of its ability to function automatically, would avoid the need of operator attendance during the running of its functions.

Chemoil is a supplier of machinery and was consulted by Acto concerning the latter's requirements. Chemoil did not at the time have any such machine in Auckland, but was aware of one possibly suitable at C W F Hamilton Limited, Christchurch. Arrangements were then made for an inspection of that machine at Christchurch, this being carried out by Mr Waddell, managing director of Acto, his foreman Mr Gordon, and Mr Green, then general manager of Chemoil. This had followed on discussions with Mr Tregonning, managing director of Chemoil. Following the inspection Mr Waddell decided to purchase the machine, and arrangements were entered into resulting in a sale, which was evidenced by a conditional purchase agreement signed by the parties on 9 February 1980. The agreement, which was assigned by Chemoil to Marac, was for a total purchase price of $22,500.00, payable as to $5625.00 deposit and the balance on terms, which after taking into account finance and other charges resulted in a total cost of $29,451.86. Payments were to be spread over a three year period. The machine was duly delivered and installed but then it was ascertained that in fact the bar feed unit was manually operated and not automatic. This had not earlier been known to either Acto or Chemoil, and I note that no question of any misrepresentation was raised. For that reason it was not suitable for Acto's needs, and as it was then believed to be impossible or impractical to convert or modify the unit to automatic, enquiries were made for a further machine which

did have the automatic function. On 3 April 1980 Acto entered into a further agreement to purchase from Chemoil a Herbert 3M model lathe in a price of $21,000.00. This was also on terms, with the agreement again being assigned to Marac. In the Sale Note evidencing the purchase, and written into that document by Mr Tregonning at the instigation of Mr Waddell, was the following additional provision :

> "We agree to sell on behalf your HITACHI 4D for no less than $22,500; we will make payments to Marac via you until m/c is sold and at that time deduct no. of payments from sale price and paying Marac Finance Limited settlement balance."

The above history is common ground and not in dispute. It is what happened thereafter that has given rise to the litigation. By the agreement of 3 April 1980 Chemoil undertook to sell the Hitachi lathe. This had not been done by 25 August of that year, on which date Mr Waddell for Acto purchased a further item of equipment from Chemoil, namely a radial drill, for a price of $6100.00. On 26 August, Acto gave a cheque for that amount, which was duly banked by Chemoil. At the same time Mr Tregonning, for Chemoil, gave Mr Waddell a cheque for $3971.00, being the amount of the instalments due to that date under the Hitachi agreement and which by the sale note of 3 April Chemoil had agreed to pay to Acto.

Up until then, no such payments had been made by Chemoil, although Acto had regularly paid Marac. It was alleged by Chemoil that on that same day, 26 August, Mr Waddell had agreed to take back the Hitachi lathe for its own purposes, that Chemoil had been requested to modify the bar feeder to operate automatically, and that Chemoil's continued liability to meet the Marac payments was terminated.

This work was completed in December 1980 and it was further alleged that Mr Waddell on 16 December, having inspected the modified machine, agreed to take delivery in the New Year. For Acto, it was claimed no such arrangement was ever entered into by it, and the 3rd April agreement continued in full force. On 27 May 1981 Chemoil wrote to Acto in the following terms :

> "Messrs Acto Engineering Limited
> Maitch Road
> MANUREWA.
>
> Attention: Mr L Waddell
> Dear Sir
>
> This letter will serve to confirm that we have as instructed by you, modified your Hitachi Seiki 4D Lathe to function "automatic bar feed". You will recollect that in October 1980 you stated to the writer and our Mr D Green that you required the Hitachi modified to auto bar feed and returned to your works as soon as possible. On that basis, we contracted Mr R Huston together with our Service Engineer and completed the modification at a cost of $2190.00.

> We advised you on the 16th December 1980 that the machine was ready for delivery and on the same day you inspected the machine operating in our works, and approved the modification.
>
> Towards the end of January 1981 you visited us and stated you were ready to arrange delivery; we have not heard from you since that date.
>
> To date your outstanding account with us is $6150.00 and we respectfully ask that you make an appointment with the writer to discuss settlement of this amount, together with the removal of your machine from our premises.
>
> Yours faithfully
> CHEMOIL MACHINERY SERVICES LIMITED "

The machine remained with Chemoil, and the next written communication was on 26 July 1983 by way of a letter from Acto to Chemoil, referring to the 3 April 1980 agreement and requesting payment of $23,750.36 being the payments made by it to Marac. Chemoil replied by letter dated 31 January 1983, reiterating the matters raised in its earlier letter of 27 May 1981, and claiming a total sum of $6159.00 plus storage charges. There was no further correspondence before the issue of the writ on 1 July 1983.

The primary question which arises for determination is whether there was an oral variation of the April 1980 agreement whereby Chemoil's obligation to sell the Hitachi lathe and to meet the Marac instalments was terminated or altered.

There is a direct conflict of evidence as to what transpired both in August and in December of 1980. Having considered all the evidence, I am satisfied what occurred was this. On 26 August Mr Waddell requested and obtained payment of the Marac instalments, and in the course of discussion indicated that because of increased workload he would be interested in taking back the Hitachi lathe if it were equipped with an automatic bar feed. However, no firm agreement or undertaking to do so was then given, and the matter was left on that somewhat indefinite basis. There was no mutual agreement between the parties which operated as a variation or cancellation of the earlier agreement of 3 April, under which Chemoil had the obligations already referred to. The existence of a variation at this date in the terms pleaded is not made out. I do not think the payment by Chemoil of the $3971.00 without express arrangement as to its repayment, the lack of express discussion as to further Marac payments, and the lack of some record, formal or informal of the ateration, can be otherwise explained. The indefinite nature of the situation at that time was also clear from the evidence of Mr Green, who had been directly involved in those discussions and who confirmed that there was at least an approach in September or October by Mr Waddell for payment of a further Marac instalment. When time and personnel became available the modifications were carried out and completed in early December 1980, and the machine was seen by Mr Waddell on 16 December.

There was, I am satisfied, some discussion at that meeting about Acto taking the machine back, but again the evidence falls short of establishing a firm agreement being reached between the parties which would effectively terminate the 3 April written agreement, or vary it except to the extent of postponing the obligation of Chemoil actively to promote the sale of the machine to some third party. In early 1981 Mr Waddell decided against the need for this additional machine, and information to this effect was conveyed by him to Mr Green. The next development was the letter of 27 May 1981 from Mr Tregonning to which I have referred, requesting acceptance of delivery of the modified machine. The gap which has occurred through to January 1983 is difficult to understand. It is probably to be explained by Mr Tregonning taking the view that there had been a commitment to take the machine back, and Mr Waddell taking the view that he was under no obligation to do so. The legal position was as I have already outlined, namely, that there was no consensual variation reached in either August or December 1980. It follows therefore that the substantive defence has not been established and the agreement of 3 April 1980 stands unaltered in its legal effect. Once that finding is made, it is accepted by Mr Vickerman for Chemoil that the Defendant is in breach.

That brings me to the question of damages. Acto has claimed the whole of the payments made

by it to Marac under the first sale agreement, namely $29,455.46, less the payment of $3971.00 made in August 1980, thus leaving a balance allegedly due of $25,484.46. In my view on the true construction of the agreement of 3 April 1980, there was no obligation on Chemoil to pay to Acto monies which had by that time already been paid by it to Marac. These consisted of the deposit of $5625.00 and the first instalment of $661.95, and these sums should be deducted from the total claimed, leaving a figure of $19,197.51. Further, in my view Chemoil made it perfectly clear, at least by its letter of 27 May 1981, that it no longer regarded itself as bound either to sell the machine or to meet the Marac payments, and clearly signalled a repudiation of any obligations it may have had in that regard. It was therefore incumbent on Acto, as beneficial owner of the machine, to take steps to mitigate any loss arising from that stance or breach. Reasonable steps in my view were to resume possession of the machine and sell it to the best possible advantage, and which were not attempted. This should have been done and, I think, concluded before the end of 1981, when the machine demand had started to drop significantly by reason of the advent of new technology at competitive prices.

I have given some thought to whether I should call for fresh evidence on the question of value as

at 1981. The point was not canvassed in detail at the hearing, but evidence as to values generally was led. I have reached the conclusion that it is better to resolve the matter now on the evidence already adduced, and thus achieve some finality. The present value of the machine is not in issue, and there is no need for it to be sold before a final determination can be made on these proceedings. The evidence I find showed that the value was dropping during 1981, from something of the order of $22,000.00 in 1980 to approximately $15,000.00 in early 1983. On balance, I consider that a figure of $16,000.00 could have been expected to be achieved had reasonable steps to sell been taken following the letter of 27 May 1981. If this had occurred, Acto would have been left with a shortfall of $3197.51, the responsibility for which lies with Chemoil as was acknowledged by Mr Vickerman in the event of there being no variation of the agreement of 3 April 1980. The machine of course remains the property of Acto.

I turn now to the counterclaim. The first claim is for $1840.00, being the cost of maintenance work carried out by Chemoil while the machine as in its possession. It seems this work was carried out between May 1981 and February 1983; no invoices relating to it were produced, and no account as such was ever sent to Acto.

There is nothing in the evidence to establish that this work was authorized or accepted by Acto, either expressly or impliedly, and this head of claim accordingly fails.

The second claim is for storage at $2190.00 plus $9.00 per week from May 1980. There was no evidence of an express agreement to pay storage, and I do not think an implied term to that effect arises in the contractual setting of the 3 April 1980 agreement. This claim is therefore not made out.

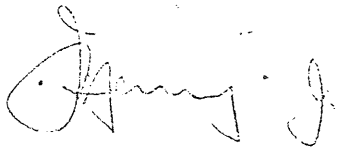
The third claim is for the cost of modifications to convert the machine to an automatic bar feed, totalling $2190.00. I find that when the August 1980 discussions took place there was an authorization, implied if not expressed, for this work to be carried out on what was then Acto's machine. I am satisfied that the approximate cost of the work was discussed, and that Acto received the benefit of the modification, which has at least to an extent increased its value. Chemoil is therefore entitled to recovery of this amount.

The final head of claim was for $3971.00 being on the pleadings the balance on the sale and purchase of the radial drill. I think the evidence establishes beyond question that the drill was paid for in full on

26 August 1980. If the claim is amended to seek a refund of the Marac payment, which is what the amount really represents, then that must fail because it was a payment Chemoil was obligated to make, and which was only refundable from the proceeds of sale with, as I have said, the responsibility for any shortfall lying with Chemoil. The net result is that on the counterclaim Chemoil is entitled to judgment for the sum of $2190.00.

In the circumstances it is proper to offset that amount against the Acto's entitlement with its cause of action and there will accordingly be judgment for the Plaintiff in the net sum of $1,007.51. In the circumstances, I decline to allow interest.

The plaintiff is entitled to a moderate award of costs which I fix at $250.00 together with disbursements and witnesses expenses to be fixed by the Registrar.



Solicitors:

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Keegan Alexander & Co., Auckland, for defendant