

WHL

24/2

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BETWEEN AUCKLAND EXPORT LIMITED

Plaintiff

86

A N D WILLIAM FORCH

Defendant

Hearing: . 17, 18 & 25 August 1983

Counsel: Grove and Keene for Plaintiff
Gittos for Defendant

Judgment: 20 February 1984

JUDGMENT OF PRICHARD, J.

The Plaintiff claims the sum of \$21,414.07 being the amount allegedly overpaid to the defendant in respect of the defendants' 1979 crop of kiwifruit, sold by the Plaintiff as the Defendant's agent.

The Plaintiff company is in the business of exporting horticultural produce, principally kiwifruit. The fruit, which is harvested in May, is graded and packed by the growers. The exporting company takes delivery of the fruit into cool storage, arranges for inspection by the Ministry of Agriculture and Fisheries, for transport to the overseas markets, and negotiates the export sales. At the relevant time (1979), there were nine New Zealand companies operating as licensed exporters of kiwifruit and, needless to say, they were in keen

competition for the available fruit. The Plaintiff company offered its grower clients a choice of two methods of doing business - the company was prepared to purchase the fruit outright, or it would sell on overseas markets as the grower's agent. In the terminology of the company, sales made under the agency arrangement were called "Grower Account Sales" while outright purchases by the company were called "Firm Price Sales". Most growers preferred the agency arrangement. By retaining ownership of the fruit until it was purchased overseas the grower had a good chance of obtaining a better price than the company could afford to offer for an outright purchase, and the grower was able to take advantage of tax incentives offered by the Government to successful exporters of New Zealand produce.

The export sales are spread over a period of several months so that final proceeds may not come to hand until early in the year following the harvest. To assist growers (and, incidentally, to attract their business) the exporting companies were prepared to make advance payments to the growers.

In 1979 the Plaintiff company offered to make advance payments totalling \$6.50 per tray - one payment in March and another within 10 days of receiving the fruit.

In soliciting business from growers, the Plaintiff offered to pay a "bonus" of 20c per tray to those growers who supplied their whole crop to the Plaintiff company.

Growers were invited to specify the period or

periods in which their fruit would be sold overseas. Higher prices can generally be obtained by holding the fruit in cold storage and selling late in the season - but, of course, this is attended with extra costs and the risk of deterioration in storage.

Mr Forch, the Defendant, agreed to have the whole of his 1979 crop sold by the Plaintiff under its "Grower Account Sales" scheme and elected to have his produce sold in "Group Two" to be seafreighted between May and September 1979. The estimated crop was 14,000 trays. In agreeing to this arrangement, Mr Forch stipulated that he receive an advance payment of \$24,000 after 31 March 1979 and before 15 April 1979, as he wished to pay off a mortgage before 17 April.

In pursuance of that arrangement, Mr Forch delivered 14,436 trays of kiwifruit to the Plaintiff, and the Plaintiff paid Mr Forch a total of \$93,834 being advance payments in respect of 14,436 trays of kiwifruit at \$6.50 per tray. But unfortunately Mr Forch's fruit was infected with bothrytis which caused a considerable loss of fruit while in the coolstore. Even more unfortunately, the prices realised in the export market were substantially less than either party anticipated. For one reason or another, only 12,683 trays of the Defendant's fruit was fit for export. And, according to the Plaintiff's reckoning, the price realised overseas was only sufficient to give Mr Forch a return of \$5.71 per tray (including the 20c bonus). 12,683 trays at \$5.71 per tray is \$72,419.93. Accordingly it is the Plaintiff company's claim that Mr Forch was overpaid by \$21,414.07 - and that is the amount for which the Plaintiff now sues the Defendant.

The Defendant says that it was agreed that the advance payment of \$6.50 per tray was to be a minimum payment, not subject to refund of the excess if the export price was insufficient to produce a nett return of \$6.50. The Defendant further says that, in any event, the Plaintiff arrives at the figure of \$5.71 per tray as the nett return to the grower by charging to the grower expenses which are properly the Plaintiff's responsibility. As to the fruit which was affected by bothrytis, the Defendant says this loss was due to the Plaintiff's negligence in handling the fruit and/or in failing to take out appropriate insurance cover on his behalf.

In essence, the disputes between the parties stem from the fact that in soliciting business from growers the Plaintiff failed to state in specific terms the basis on which it intended to charge for its services. The Plaintiff company was it seems, reluctant to commit itself to explicit terms so that, in effect, growers were invited to engage the Plaintiff as a commission agent without any agreement as to what rate of commission would be charged or what marketing costs the growers would be required to bear.

In the absence of express terms, it becomes necessary to review at some length the evidence of the correspondence and discussions leading up to the Plaintiff's engagement as the Defendant's agent.

Mr Forch had disposed of his 1978 crop through the Plaintiff company, mostly on "Firm Price Sales" - but he was not wholly satisfied with the company's performance. On 21 January 1979, he wrote to the company expressing his dissatisfaction on

several counts. In particular he complained of the fact that he was required to pack the 1979 crop in trays, not in boxes as previously. He concluded his letter with the observation that he had no intention of staying with the company "unless you come up immediately with positive and substantial aid, proposals and concessions". The packaging argument was in the nature of a preliminary skirmish. It was eventually resolved when the company agreed to supply Mr Forch with trays and packaging materials on favourable terms. The only relevance of this matter is that Mr Forch's attitude and the company's anxious desire to retain his business were part of the background to the subsequent discussions.

On 15 March 1979 the Plaintiff company sent out a cyclostyled letter addressed to individual growers, reviewing the course of trading in the 1978 season and comparing the results achieved by growers under the "firm price sales" and the "grower account sales" respectively. The letter was as follows:-

"

15 March 1979

Mr W.L. Forch,
Te Puna Road,
R.D. 6,
TAURANGA.

Dear Bill,

REVIEW OF 1978 SEASON

Now that the 1978 export season has concluded, we take this opportunity to review with you, pricing levels and patterns that emerged. With our recent payment having been made, you will be able to gauge the pricing levels we have achieved and the success of our marketing practices overseas.

At the commencement of the 1978 season, we offered a 'firm price' of \$6.15 per tray for outright purchase of fruit.

Such a purchasing arrangement gives the grower the advantage of an immediate lump sum payment and passes the overall responsibility for the fruit to A.E.L.

After the success of firm sale arrangements overseas, a further payment of .25 cents per tray was forwarded in February, bringing the total paid to \$6.40 per tray.

In addition to the above, we respectfully point out some of the other advantages which would have accrued at least .50 cents per tray to most growers who supplied our company last year. These include:

Pallet rebate equivalent to 5.6 cents per tray.

Supply of competitively priced packaging materials, e.g.,
wood approximately 5 to 7 cents per tray lower than average when first introduced

cardboard approximately 10 to 15 cents per tray lower than average.

No freight charges on any produce or materials.

Pre-season advance payment of \$1,00 per tray, paid in March/April

No coolstorage charges for Taurange growers.

The following shows 1978 actual returns plus indirect benefits:

| <u>Direct Payment</u> | <u>Indirect Benefits</u> | <u>Whole of Crop & Volume Bonus</u> | <u>Total Possible Return</u> |
|-----------------------|--------------------------|---|------------------------------|
| \$6.40 | .50c. | .25c. | \$7.15 |

SUPPLY ARRANGEMENTS 1979 SEASON

We are pleased to confirm that our company will be taking a very positive approach to supply and purchase arrangements for the coming season based on our experience during 1978. Our 'firm price' offer will of course, be very attractive and will include a cash advance payable in March/April of approximately 50% of the price which we will be advising shortly.

Should you be interested in claiming the tax incentive for yourself, the opportunity to participate in the "Three Group" selling concept is available. As the Three Group selling system was very well accepted on the part of all our overseas customers, we are retaining the system with minor modifications as follows:-

| | | |
|-------------|------------|--------------------|
| Group One | Airfreight | May - June |
| Group Two | Seafreight | May - September |
| Group Three | Seafreight | October - December |

An indication of the range of possible returns as realised

for the 1978 Three Groups selling system is as follows:-

| | |
|-------------|------------------|
| Group One | \$6.70 to \$7.15 |
| Group Two | \$6.78 to \$7.23 |
| Group Three | \$7.16 to \$7.61 |

Advances for Grower Account Sales are being made available in March and April at the rate of \$2.00 per tray for total production up to 10,000 trays and \$1.00 per tray for production over 10,000 trays.

We fully realise that you will be waiting final results from all companies before making a firm decision as to supply arrangements for the coming season. However, we would stress that our company confidently expects to be at least competitive for those receiving our minimum payments, with the added attraction of bonuses and later group sales. This is also a factor which you will no doubt have in mind when considering supply arrangements in the near future. Subject to the general level of pricing and your desire to deal with our company but without any commitment whatsoever, we would ask you to give some thought to a pattern of supply quantities which you would consider at least tentatively suitable for 1979.

For this purpose, we are attaching two separate pages and would ask you to kindly fill in the appropriate spaces and return this either in person or in the stamped addressed envelope to our Te Puke office. The second sheet would be a copy for your own record. Your assistance in this direction would be greatly appreciated as it will directly help in our planning for supply, packaging, storage, shipping and all other marketing and distribution arrangements for the 1979 season which is so rapidly approaching.

Naturally, A.E.L. representatives will be visiting you to discuss supply arrangements before you make a firm and final commitment.

We thank you in anticipation of your co-operation in this matter and trust that you will be inclined to do business with our company during this and subsequent seasons. Should you wish to discuss any aspect, please feel free to contact Graeme Crossman at our Te Puke office or myself at the Auckland office or in Te Puke, as applicable.

Kind regards,

Yours sincerely,
AUCKLAND EXPORT LIMITED

(signed Graeme)
Graeme K. Rutherford
Managing Director.

On 21 March 1979 the Plaintiff company again addressed a cyclostyled letter to the Defendant as follows:-

"

21 March 1979

CONFIDENTIAL

Mr W.L. Forch,
Te Puna Road,
R.D.6,
TAURANGA.

Dear Bill,

Export Supply and Purchase Arrangements: 1979 Season

During 1978 we adopted new supply arrangements and methods of export sales which have proven very successful. Results achieved have exceeded our earlier indications and overall are more than competitive.

Overseas customers have totally accepted the new sales and pricing arrangements. They are particularly emphatic about the need to achieve a planned spread of shipments and sales from May to November and in some cases to December.

As a result of the acceptance of these methods and especially the very favourable actual prices paid to growers for 1978 we have a sound basis to formulate proposals for 1979. These are not just vague hopes but firm projections based on actual performance last season.

1. Firm purchases

Min. price per tray \$8.00

Payment: March (or on commitment) \$4.00

On invoice May/June \$4.00

(less any packaging account)

Any additional payment to follow at end of season.

2. Grower Account Sales

Advances to total of \$6.50 per tray

Group One: Air freight May-June (no cost of coolstorage)

Group Two: Sea freight May-September

- This is a greater spread and will provide a good level of return.

Group Three: Sea freight October-December

- Commensurate with risk and coolstorage costs, significantly higher returns can be expected (refer to our 78 Season Review).

We recommend you spread quantities as most suitable. For Group Three both cardboard and wooden trays are acceptable, however it is worth noting that the use of wooden trays with cardboard lids would allow easier inspection.

Payments: Advances: Total of \$6.50 per tray to be paid.

March: \$2.00 per tray for first 10,000 trays

\$1.00 per tray for quantities over 10,000 trays.

May-June: Further \$4.50 to \$5.50 within 10 days of receipt of invoice following packing and coolstorage.

Where packaging accounts are involved approx. \$1.00 to be transferred (out of above) on 1st May to avoid time consuming deductions from remittances.

Progress Payments:

Group One: 31 August
Group Two: 30 November
Group Three: 31 January

Final Payment:

Growers Account and Firm Purchases: 28 February.

Bonuses:

Whole of Crop: 20 cents per tray.

Regular supply of less than whole of crop will be acknowledged by a proportionate amount.

Volume: We are discontinuing 'volume bonuses' due to anomalies which arise.

We must stress that the above offer is the same for all suppliers, i.e. irrespective of whether Co-op members or private packhouse growers, or production districts. Accordingly no variations will occur except for quantities to be supplied for each Group.

We are endeavouring to visit and discuss these proposals with both existing suppliers and other growers who may be interested in AEL's proposals for this season. Meantime please do not hesitate to contact us should you require more information or clarification on any aspect.

Kind regards,

Yours sincerely,
AUCKLAND EXPORT LIMITED

(signed Graeme)
G.K. RUTHERFORD
Managing Director. "

On or about 27 March, 1979, Mr Rutherford, Managing Director of the Plaintiff company and Mr Brown, who was then assistant Manager at the company's Te Puke branch, called on Mr and Mrs Forch to discuss arrangements for the sale of the 1979 crop. It was, according to Mr Rutherford, a wide ranging discussion. Mr and Mrs Forch were in two minds as to whether to accept the company's offer of outright purchase at \$8.00 per tray or whether to elect the agency arrangement. Mr Forch says that he and his wife wanted to be sure that if they chose the agency arrangement they would receive at least the advance payments (totalling \$6.50 per tray) offered by the company, irrespective of whether the export prices would sustain that figure. He said in evidence:-

"... my wife asked him (Mr Rutherford) point blank, and I'm very positive about that "But the \$6.50 is for sure Mr Rutherford?" and his answer was affirmative and it clinched the whole deal... There was not the slightest doubt about it that the \$6.50 plus 20c. namely \$6.70 was the minimum price."

Mrs Forch confirmed this evidence. She said:-

"I said, "Mr Rutherford, about the price of Growers Account Sales, you said that it might - the final price might - be more or less than \$8, but the \$6.50 is that for sure?" And Mr Rutherford said, without any hesitation, "Yes". Then I asked is the 20c. for the whole of the crop, does that come on top of the \$6.50 and he said "Yes, that is correct". "

Both Mr Rutherford and Mr Brown emphatically deny that anything of the sort was said. Mr Rutherford's evidence is as follows:-

"The subject of advances was, I'm sure, discussed and I certainly do not agree with his contention that representations were made to the effect that \$6.50 was going to be a guaranteed minimum. That was not the nature of the arrangement. It would be totally

inconsistent with the practices which had been developed and indeed accepted within the industry - quite frankly a proposition which our company could not countenance or regard with any degree of equity in our dealings with other growers. I would add that our firm price indicated that we (and all other companies) were hopeful of achieving price levels which would be in excess of the \$6.50 advance but there was certainly no representation made to guarantee that otherwise there would not be a Grower Account Sale ... there certainly was not in this case any suggestion of an absolute guarantee of either the \$6.50 minimum or that there would be further payments guaranteed. It was simply inconsistent with the terms of sale."

Mr Brown's evidence was to the same effect.

Following the discussion between Mr and Mrs Forch, Mr Rutherford and Mr Brown, Mr Forch wrote to the Plaintiff company on 27 March agreeing to supply the whole of his crop to the company to be sold on his behalf in the "Group 2" period.

In view of the conflicting evidence as to what was said at the meeting of 27 March with reference to the advance payments, I have had regard to the contents of the Plaintiff's letters. The letter of 21 March 1979 refers to the progress payments as "Advances to total of \$6.50 per tray". If there is nothing further this must mean that payments will be made on account of (or as advances against) the proceeds of anticipated sales; it implies that if the advance payments exceed the amount actually realised, the recipient will refund the excess (Rivoli Hats Ltd v. Good (1953) 2 All E.R. 823).

The letter of 15 March 1979 contains this enigmatic sentence:-

"However, we would stress that our company confidently expects to be at least competitive for those receiving our minimum payments, with the added

attraction of bonuses and later group sales".

Mr Gittos argues that use of the expression "minimum payments" in the same sentence as "bonuses and later group sales" can only mean that the context is referring throughout to "Grower Account Sales" - that the "minimum payments" are the advances. However, the reference to bonuses is not necessarily significant; in the 1978 season growers who sold outright to the company at a fixed price were in fact paid bonuses in recognition of the high prices obtained in the export market in that year. (This seems to have been a payment made ex gratia to growers who accepted the fixed price offer.)

The reference to "later group sales" does not seem relevant to fixed price sales; but the sentence as a whole could well be referring to the company being competitive in both areas - i.e. in grower account sales and fixed price sales. Neither Mr Rutherford nor Mr Brown seemed sure what was meant by this particular sentence in the letter of 15 March 1979 - and I confess that I am in the same difficulty. Mr Forch did not seem to attach any particular importance to it.

Although I am satisfied that Mr and Mrs Forch genuinely believe that they entered into this transaction on the understanding that the \$6.50 (plus 20c. "whole of crop" bonus) was, as they put it, a "minimum" payment, I am not satisfied that this was in either a contractual term to which the Plaintiff company agreed or that it was an actionable representation made by Mr Rutherford during the negotiations. It can be safely inferred from the firm price offer of \$8.00 per tray that Mr Rutherford was confident that \$6.50 would in fact be exceeded. He was there to persuade a difficult customer to continue to deal with

his company; no doubt he stressed to Mr and Mrs Forch that "Grower Account Sales" clients would probably receive a return in excess of \$6.50. He does not deny that this was so. But it was, I think, a statement of opinion, an opinion which Mr Rutherford genuinely held, as to the prospects of future trading. I do not think it was any more than that.

I must find, therefore, that the "advance payments" were not a minimum payment, as the Defendant contends, but were simply payments made on account of anticipated future returns, to be accounted for in due course when the actual returns were ascertained.

As to the 1,753 trays of fruit which were taken into storage but not exported, the evidence is that when the fruit was inspected in the cool store by representatives of the Ministry of Agriculture and Fisheries in August 1979, it was found that much of the fruit was infected with bothrytis and also, according to the evidence of Mr Brown, there was a considerable proportion of damaged and misshapen fruit which was not acceptable for export. Initially the whole crop was rejected for export, but Mr Brown was able to persuade the inspectors to agree to the fruit being sorted and repacked. At the time when the trouble was discovered Mr Forch was on an overseas trip - he left on 2 July. Mr Brown discussed the situation with Mr Forch's solicitor who, after consulting with Mr Forch by telephone, arranged for the fruit to be repacked by a firm of contract packers. Mr Muller, principal of the firm, said in evidence that he was surprised at the extent of the bothrytis infection and also by the number of damaged and misshapen fruit. This evidence

was confirmed by Mrs Carlson, an employee of Mr Muller's firm, who took part in the repacking. No record was kept of the respective quantities of fruit rejected for bothrytis infection or because it was misshapen or physically damaged. The evidence of Mr Brown, Mr Muller and Mrs Carlson was in conflict with that of Mr Russell, who was employed by Mr Forch to check the fruit as it was originally packed and who assisted in the repacking. Mr Russell said that there was very little damaged and misshapen fruit. However, Mr Brown was able to produce photographs of both bothrytis infected fruit and also misshapen and damaged fruit: I am satisfied that, in addition to the bothrytis infected fruit, there was a considerable proportion of the fruit unacceptable for export because it was misshapen or damaged.

The Defendant claims that the loss occasioned by the bothrytis infection and the consequent repack should be borne by the Plaintiff company - on the ground that either the Plaintiff was negligent in its handling and storage of the fruit or in failing to insure against deterioration while in storage. I reject that claim.

Neither party called expert evidence as to the nature and characteristics of bothrytis. It appears from the evidence that the infection is present in the fruit when it is harvested and becomes apparent when the fruit rots while in storage. In the absence of any undertaking I do not think the Plaintiff was obliged to insure the Defendant's crop against loss due to a latent defect which was present when the fruit was taken into the Plaintiff's custody. There is no evidence of negligence

on the part of the Plaintiff company in handling and storing the fruit - indeed if it were not for the efforts of the Plaintiff, it is probable that the whole crop would have been rejected for export.

One consequence of the repacking of the fruit was that a proportion of the Defendant's crop (8153 trays) was not able to be shipped with the "Group Two" fruit (May-September) and was exported and sold with the "Group Three" fruit (October-December). According to the Plaintiff's accounts, the Group Three fruit realised about 20c. per tray more than the fruit in Groups One and Two. The Plaintiff's calculations are on the basis that the Defendant is entitled to only Group Two prices. The Defendant contends that the Plaintiff is bound to account for the actual proceeds of sale of his fruit, including the quantity sold at the higher price, irrespective of the fact that he elected to have all his fruit sold in the "Group Two" period.

There is a dearth of evidence on this question. I understand that the Plaintiff concedes that 8153 trays of the Plaintiff's fruit was sold in the October/December period, but the Plaintiff says that this was incidental to the salvage operation which it undertook in the Defendant's interests while he was overseas and that the repacked fruit was sold in the Group Three period at the cost (to the Plaintiff) of transferring to Group Two an equal quantity of fruit owned by Group Three suppliers, to whom the Plaintiff had to account at Group Three prices. In all the circumstances I do not think the Defendant is entitled to the benefit of the Group Three price.

I turn then to the question of the deductions which the Plaintiff claims to be entitled to make against the price realised in the market place. The Defendant takes strong exception to the Plaintiff's calculation leading to the figure of \$5.71 per tray as his nett return. He accepts the fact that in accounting to individual growers, the Plaintiff company could only pool the results of all sales in each group. But he takes particular objection to the inclusion amongst items debited to the "Grower's Pool" of items which, in his submission, are properly attributable to the company's promotion and administration of its own business, including interest on funds raised by the company ostensibly to finance the progress payments made to growers. He takes exception also to the fact that the bonus of 20c. per tray promised to growers who committed their whole crop to the Plaintiff was in fact debited to the "growers pool" so that, in effect, the bonus was paid, not by the company from its own funds but by the growers to themselves. On this score he counterclaims for \$2887.20 as the amount of the unpaid bonus. Furthermore, the Defendant says he lost \$10,038.66 because of the Plaintiff company's negligence in handling his fruit or in failing to insure his fruit on his behalf against the bothrytis damage which resulted in 1,753 trays of fruit not being exportable. The loss claimed under this head is calculated on the basis of \$6.50 per tray less a credit of \$1,355.84 being the salvage value of such of the affected fruit as could be sold for processing.

I turn then to the Plaintiff's evidence of the returns actually achieved. Detailed audited accounts were produced to show how the Plaintiff arrived at a figure of \$5.71

per tray as the basis for the amount credited to the Defendant. The method used was to pool the results of export sales of fruit from all the company's "Grower Account Sales" clients in each group thus arriving at a "value per tray" in each group by dividing the overall yield of the group by the number of trays sold. Items of expenditure incurred by the Plaintiff in relation to those sales plus a figure for the company's profit, or commission were similarly reduced to a "cost per tray" figure. Subtracting the "cost per tray" from the "value per tray" gave the grower's nett return per tray. The Defendant does not dispute the system of group accounting but takes strong exception to a number of items deducted as expenses. According to the Plaintiff's figures, the nett return to growers who elected to have their fruit sold in groups 1 and 2 was as follows:-

| | |
|---|---------------|
| Nett CIF value per tray (after adjustments for commissions and discounts) | \$9.654 |
| <u>Less</u> insurance, freight and storage | \$2.643 |
| | <hr/> \$7.011 |

Less Bay of Plenty expenses:
for freight, cartage, quality control, export operations, and container loading etc. .178

Selling costs:
Includes brochures, labels, overseas selling costs, certification and documentation .343

| | | |
|---|------|---------------|
| <u>Commission</u> Including administration office and staff costs, KMLA levy and profit, | .695 | <hr/> \$1.340 |
| Average revenue paid to suppliers (inclusive of bonus to whole of crop suppliers) | | <hr/> \$5.671 |

In Mr Forch's view, there was to be added to this figure 20c. per tray being the whole of crop bonus promised to growers who supplied their whole crop to the Plaintiff. However, the 20c. expected by Mr Forch became, according to the Plaintiffs calculation, only about 4 cents (\$.039) above the "average" paid out to all growers in Groups One and Two as follows:-

| | |
|--|-----------|
| Total of crop bonuses | \$152,574 |
| divide total number of trays (947,668) | 0.161 |
| Deduct \$0.161 from nett return inclusive of bonus: | 5.671 |
| | <hr/> |
| | \$5.510 |
| Add whole of crop bonus applicable to W.L. Forch | 0.20 |
| | <hr/> |
| Return per tray - W.L. Forch | \$5.71 |
| | <hr/> |

In short, the Defendant says that the "bonuses" to whole of crop suppliers was not as promised paid by the company from its own funds but was paid out of the pool of funds derived from sales of fruit made on behalf of the suppliers themselves.

In the complete absence of any agreement as to the Plaintiff company's remuneration, it is implicit that the Plaintiff is entitled to reimbursement for expenses reasonably incurred in carrying out its contractual obligations and also to a reasonable remuneration for its services. This proposition

is accepted by the Defendant and without question.

The figures submitted by the Plaintiff in support of its claim show that the commission charged is slightly less than 10% of the price realised after deducting the cost of insurance, freight, and storage. This is a modest margin of profit having regard to the high degree of initiative and expertise displayed by the Plaintiff company in developing and exploiting the overseas market for kiwifruit. It is reasonable that in addition to the commission claimed, the Plaintiff should recoup costs entailed in handling the fruit both here and overseas and all its direct selling costs. The Defendant agrees that those costs include the item of \$.124 per tray described as "Includes brochures, labels, overseas selling costs, certification and documentation".

But the claim for \$.178 for "Bay of Plenty expenses" includes a number of items which obviously pertain to the Plaintiff's administration of its own affairs, including its efforts to obtain business from growers, rather than to its activities in handling and selling the defendant's kiwifruit. Under the heading of "Bay of Plenty expenses" the Plaintiff claims the following deductions:-

| | <u>Total</u> | <u>Per Tray</u> |
|----------------------------|------------------|-----------------|
| Inspection and sundry | \$13,339 | \$0.014 |
| Freight and cartage | 43,363 | 0.049 |
| Insurance | 1,075 | 0.001 |
| BOP Procurement expenses | 78,181 | 0.082 |
| Other procurement expenses | 6,431 | 0.007 |
| BOP salaries | 23,445 | 0.025 |
| | <u>\$168,834</u> | <u>\$0.178</u> |

(These figures are related to total sales of 947,668 trays). The item "BOP procurement expenses" comprises the whole cost of maintaining the Plaintiffs' office at Te Puke including, inter alia, wages (\$27,242), office expenses (\$7,285), accommodation and entertainment expenses (\$3,562), vehicle expenses (\$21,494), and the cost of renting a house at Papamoa beach (\$4,925.57). In addition the grower's account is debited with the salaries of representatives based at Te Puke totalling \$23,444.88. In my view the items claimed for inspection, freight and cartage and insurance (amounting to \$.064 per tray) are clearly referable to activities undertaken in the course of effecting sales of the grower's produce - but the "procurement expenses" and the salaries of the Plaintiff's staff (amounting to \$.114 per tray) relate to the Plaintiff company's administration of its own affairs, and particularly to its efforts to obtain business for itself, and should, in my view, be covered by the Plaintiff's commission charges instead of being debited to the grower's funds.

The item of \$.343 per tray debited to the grower's funds for interest and bank charges is related to interest paid by the Plaintiff company on all its borrowings during the year 1979-80 - a total interest bill of \$264,359. Of this total 96.52% or \$255,159, is allocated to kiwifruit sales and 3.48% or \$9,200 to other sales. The Plaintiff claims to recover its interest payments from the growers not on the basis of an implied contract to pay interest on the advances but on the basis that interest on the company's borrowings were part of its expenses, necessary to enable the Plaintiff to make the advance payments to growers. However, it is not possible to determine from the Plaintiff's evidence the extent to which the

company's total borrowings were applied in making advance payments to growers, nor do the accounts submitted give any indication of either the period during which the company was in fact out of pocket on account of advance payments or the period during which it held funds in credit to the grower's account.

In the correspondence leading up to the Plaintiff company's employment as the Defendant's agent, there was no mention of a charge being made by the company for the accommodation offered to growers by way of advance payments. I think the Defendant was entitled, in the circumstances, to assume that the advance payments were offered free of interest as an inducement to growers to engage the Plaintiff company as selling agent; if the Plaintiff intended to charge interest on the advance payments, it should have said so. There was certainly nothing in the negotiations to suggest that the grower's funds would be debited with the whole of the company's interest bill for the year in question; nor is it likely that Mr Forch (or any other grower) would have agreed to such a carte blanche arrangement had it been suggested.

In my view, the amount debited to the grower's account for "Bay of Plenty Expenses" should be \$.064 per tray (not \$.178 as charged in the accounts). The Plaintiff has not justified its charge to the growers of \$.343 per tray for interest. On account of those two matters the return to the grower should be increased by \$.457 per tray i.e. from \$5.671 to \$6.128 per tray. As to the 20c. per tray "Whole of crop bonus", this was offered as an inducement to

growers to supply the Plaintiff with their whole crop. I can see no justification for translating this offer by the company into an arrangement whereby the grower's funds were distributed unequally, at no cost to the company. The 20c. per tray should be credited by the company to Mr Forch, increasing the nett return to Mr Forch to \$6.328 per tray - or, for 12,683 trays \$80,258. I deal with the bonus question in this way in lieu of treating it as an item of counterclaim.

The Defendant has received by way of advances and progress payments to sum of \$93,834 - an overpayment of \$13,576. The Plaintiff is entitled to judgment for \$13,576 with costs according to scale and disbursements and witnesses expenses as fixed by the Registrar. There will be a certificate for second counsel. No costs are allowed on the counterclaim. I do not allow interest on the amount recovered by the Plaintiff as I am satisfied that this litigation is substantially occasioned by the failure of the Plaintiff company to state at the outset the terms on which it offered its services and its subsequent delay in explaining in explicit terms how it arrived at the figure of \$5.671 per tray as the nett return to the Plaintiff.

John Dickson J.

Solicitors:-

Morpeth, Gould & Co.,
Auckland, for Plaintiff.