B'Wood's 17/5 X

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

M.No.142/82

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BETWEEN TERRY ADCOCK
Appellant

AND JOHN PHILIP EVANS
Respondent

Hearing: 15 March, 1984.

Counsel: R.P. Bates for Appellant
J. Guthrie for Respondent

Judgment: April, 1984.

JUDGMENT OF VAUTIER, J.

The appellant in this case was the defendant in an action brought against him in the District Court at Dunedin by the respondent in which $12,000 was claimed by way of damages for alleged breach of contract. The damages claim actually advanced by the respondent was for the sum of $15,000 but the excess over $12,000 was abandoned in order to bring the claim within the jurisdiction of the District Court. There was a counterclaim made by the appellant for the sum of $735.77 being the amount of a payment made by the appellant in respect of the sale price of certain goods which amount the appellant claimed should have been reimbursed to him by the respondent. It also appears from the second of the judgments hereafter referred to that the respondent also conceded at the hearing that the appellant was entitled to a set off if the respondent succeeded in his claim for the sum of $390 in respect of certain commissions.

These two parties are professional golfers and at the material times the appellant held the appointment of professional to the Otago Golf Club at Balmacewen and the respondent held such an appointment at the Chisholm Park Club. Each operated in conjunction with the usual professional coaching business a shop for the supply of golfing equipment to players at the club.

The respondent in his statement of claim alleged that he was a party to certain agreements with wholesalers for the supply to him of golf equipment and that an oral agreement was entered into between him and the appellant on or about 16 June, 1980 incorporating a number of terms set out with particularity in the statement of claim as follows:

"(a) That when the Appellant desired to purchase golf equipment from any of the said wholesalers with whom the Respondent had existing supply arrangements, the Appellant would place an order for the supply of such golf equipment with the said wholesalers through and in the name of the Respondent.

(b) That all such equipment ordered by the Appellant as aforesaid would be available to him on the same favourable terms and conditions as had been negotiated by the Respondent with the said wholesalers for his benefit.

(c) That all or any orders for the supply of golf equipment placed by the Appellant with the said wholesalers would be placed through and in the name of the Respondent and the Appellant would not place such orders in his own name nor purchase such golf equipment directly from the said wholesalers.

(d) That any golf equipment as ordered by the Appellant from the said wholesalers would be delivered by the said wholesalers directly to the Appellant at his place of business at Balmacewen Golf Course.

(e) The amount charged by the said wholesalers for the supply and delivery of the said golf equipment to the Appellant ("the cost price") would be paid to the said wholesalers by the Respondent.

(f) That all golf equipment so supplied to the Appellant would be sold by the Appellant to his customers at current market prices ("the sale price").

(g) That at the end of every week during the currency of the agreement the Appellant would ascertain "the sale price" and "the cost price" of all golf equipment sold by the Respondent to his clients being golf equipment which had been supplied to the Appellant by the wholesalers in terms of the agreement. The amount of "the sale price" less "the cost price" was deemed to be profit ("the profit").

(h) That after the calculation of "the profit" the Appellant would immediately pay to the Respondent an amount equal to the sum of the "cost price" and 50% of "the profit".

(i) That the term of the said agreement for the supply of golf equipment was for a period of not less than 12 months from and inclusive of the 16th day of June 1980. The said agreement was to be determinable after the expiration of the first 12 months by reasonable notice being given by either party."

It was further alleged that golf equipment was duly supplied to the appellant in pursuance of this agreement, sold by the appellant and the sums payable by the appellant to the respondent were duly paid in accordance with the foregoing terms until 31 July, 1980 but in the following month the appellant, in breach of the agreement, commenced to purchase goods directly from the wholesalers with a result that the respondent was deprived of and prevented from making the profit which he would have made if the appellant had complied with the terms of the agreement.

The defence advanced by the appellant was that no agreement was entered into between the parties on or about the date mentioned and that all that occurred was that a preliminary discussion took place between the parties. Alternatively, it was alleged that if an agreement was entered into the respondent

breached the agreement in that he was unable to supply golf equipment from the major supplier of such equipment. The further alternative defence was advanced that if there was an agreement as alleged, it was an implied term that the normal business practice regarding payment of accounts applied and the respondent, it was alleged, acted in breach of such implied term by failing to pay the accounts which he incurred both for equipment required for his own business and for that required to supply the appellant during the period June to September, 1980. Although not specifically so pleaded the contention at the hearing was that this breach entitled the appellant to rescind. A further ground of defence pleaded was not pursued.

The background of the dealings between these two parties was that the appellant, while in New Guinea working as a golf professional, learned through the respondent of the pending vacancy for a professional at Balmacewen and attained the appointment to this position, to some degree at all events, with the aid of the respondent. The matter became the subject of very lengthy evidence in the District Court occupying in all some five days. Two judgments were given by the Judge, G.J. Seeman, Esq., one a reserved judgment delivered on 30 August, 1982 and the other an oral judgment given on 14 March, 1983 following the hearing of further evidence on that day relating to the question of damages. Two judgments were necessary because the evidence which was adduced at the original hearing was deemed by the Judge to be insufficient to enable him to assess the damages in the event of his finding that liability on the part of the appellant had been

established. At the conclusion of the first hearing the Judge so advised counsel, saying that the evidence presented on the question of damages was not in his view satisfactory evidence for the purpose of proper assessment of damages and that a reference might well prove necessary. The parties then agreed that the question of liability should be determined by the Court first and the matter of damages reserved for further consideration. The Judge having held that a contract was entered into between the parties and that the appellant had acted in breach thereof, there was a further hearing with additional lengthy evidence on the question of damages, the most important part of that evidence being that of a chartered accountant engaged by the appellant to examine the records and obtain all the necessary information from the appellant to enable an assessment of the damages to be prepared, this to be computed in accordance with the findings as to liability in the judgment which had been given on 30 August, 1982, and, it should be mentioned, taking into account certain statements included in that judgment as to the basis upon which, in the Judge's view, the damages in the case should be assessed. The respondent did not call any expert accounting evidence in opposition to that called by the appellant at the second hearing but there was extensive cross-examination on behalf of the respondent both of the appellant and of the chartered accountant, Mr Stewart, with regard to the detailed figures presented by him. The judgment given following this hearing still did not include the Court's final assessment of damages. It is accordingly described by him as an interim judgment. It does, however, specifically deal with and adjudicate upon three particular aspects of the assessment presented by the witness

Mr Stewart in which adjustments were made downward in the loss and profit figures arrived at to provide for various matters which, in the witness's opinion, had properly to be so provided for in order to arrive at a fair and accurate computation of the respondent's loss computed in accordance with all the findings made in the judgment of the Court given on 30 August, 1982. Two other items of adjustment were those to which I have already referred, namely the item of $390 for commissions and the amount of $736, being the rounded off amount of the sum paid direct by the appellant for equipment as previously mentioned. As to these items the judgment recorded that on the basis that the other items of deduction were disallowed the respondent would not further contest the two items of deduction to which I have just referred.

The judgment left the parties to carry out for themselves the arithmetical calculations necessary to compute the amount for which the respondent was entitled to judgment and liberty was reserved to apply for any directions as necessary. On this basis counsel then reached agreement as to the sum for which judgment was to be entered. Counsel for the appellant made it clear that he was not thereby accepting that the respondent was entitled to judgment for this or any other amount. The figure arrived at, $9,778.50 is calculated as follows:

Assessed "grossed-up" profit	$21,809.00	
50% is		$10,904.50
LESS deductions:		
Commission paid to Evans	390.00	
Spalding accounts	736.00	1,126.00
		$9,778.50

The significance of the description "grossed-up" will shortly be made apparent.

In his submissions on behalf of the appellant Mr Bates relied upon the following grounds for the appeals which were brought separately against both judgments:

1. That the finding of the trial Judge that a contract was entered into between the parties was not supported by the evidence.

2. That if the finding that a contract was entered into was correct -

   (a) the finding that payment of accounts by the respondent upon the normal terms of credit was not an express or implied term of the contract was an erroneous finding of fact.

   (b) the findings that the respondent had not acted in breach of the contract by neglecting or refusing to pay for goods supplied to the appellant in June 1980 and that the appellant was not on this account entitled to treat the contract as at an end were likewise erroneous.

3. That the damages were wrongly assessed in that -

   (a) if a contract did exist between the parties the evidence showed that it was a contract to share the profit on the sale of the major items of equipment to be supplied in terms thereof and the uncontradicted evidence showed that the appellant's discounting of the listed price by 10% was in accordance with the standard

procedure adopted at the club's shop and the finding that the damages should be calculated on the basis of listed prices or a set percentage mark-up disregarding the 10% discount which the appellant in fact allowed, was not supported by the evidence. The writing back in the computation of the amount of these discounts was provided for in the figure of $21,809 referred to above.

(b) The Judge's rejection of the allowance made by the chartered accountant for interest in respect of the finance which the respondent would have had to provide if the contract had been carried out in accordance with the terms alleged by the respondent, was erroneous and contrary to the evidence. The allowance made by the chartered accountant for interest was $3,437.

(c) The Judge wrongly rejected the deduction of $751 made by the chartered accountant in respect of the respondent's share of the advertising costs incurred by the appellant.

It should be mentioned with regard to 3(b) above that the Judge in his first judgment made a specific finding concerning this aspect. He said at the conclusion of this judgment:

> "...in making that assessment (i.e. the assessment of damages for loss of profit) due credit must be given to the defendant for the fact that during that period (June, 1980 to June, 1981) (the respondent) did not use the plaintiff's finances nor stock his shop. Subject to that however submissions in regard to the assessment of damages are reserved."

I turn now to deal with the various grounds of appeal relied upon as set out above. In support of the contention that

the finding that a contract was entered into between the parties could not be supported in the light of the evidence, Mr Bates referred, first, to the fact that the evidence showed that there were important matters as he termed them which had not been resolved between the parties at the stage when the appellant decided to discontinue obtaining stock through the respondent. He referred to the evidence which the appellant gave in response to the question put to him:

> "Was there a number of details or a number of aspects of running the shop which had not been discussed at any stage?"

In reply to this question the appellant agreed that this was so and referred to the fact that the buying of second-hand equipment was never discussed nor was the fact that he, the appellant, would be giving lessons and that repairs and hiring of equipment were not discussed either.

I must say at once that the evidence thus referred to in my view does not assist the argument advanced on behalf of the appellant. The agreement as alleged by the respondent does not in its terms purport to embrace such matters and in any event I am in full agreement with the statement made by the Judge in this regard reading as follows:

> "So far as certainty in the terms is concerned, the Court has to determine whether in fact the parties were in a position to carry out their mutual obligations, even though certain specific matters have been set aside for further negotiation or reservations have been made to leave open negotiation on unforeseen contingencies."

The situation here under consideration is quite different from that which was under consideration by the Court

of Appeal in Carruthers v. Whitaker and Another [1975] 2 NZLR 667 on which Mr Bates relied. There, the decision clearly turned upon the fact that in relation to contracts for the sale of land it is the wellknown, common and customary method of dealing for a document in writing signed by both parties to be entered into. The question is in every case, as was pointed out in that case, of what is to be gathered from the express or implied intentions of the parties. Here the Judge found as a fact that there was clear evidence of an intention that the parties be bound by an agreement covering the supply of the "major items" of golfing equipment and, furthermore, the finding that the details contained in the expressly pleaded terms of contract represented the conditions under which the appellant carried on the arrangements between the parties from the period dating from his arrival in New Zealand until the beginning of August, 1980. It must be borne in mind also, as the Judge comments, that there is a greater readiness in a commercial situation such as this to accept that the parties intended that an arrangement entered into between them should have legal consequences (see Chitty on Contracts 24th Ed. Vol.1, paragraph 99 where it is said:

> "...an agreement may be complete although it is not worked out in meticulous detail. Thus an agreement for the sale of goods may be complete as soon as the parties have agreed to buy and sell, the remaining details being determined by the standard of reasonableness or by law.")

The fact that over the first few months, as I have mentioned, the appellant received and accepted stock supplied by the respondent in the manner contemplated by the arrangement as alleged and made sales and payments to the respondent in accordance with the terms referred to, makes it impossible in my view for him to contend

successfully that there was a lack of mutuality. As is said in Snell's Principles of Equity, 28th Ed. p.580:

> "...if the defendant had stood by and allowed the plaintiff to carry out an appreciable part of the contract, he will have created an equity which disables him from asserting want of mutuality."

The appellant here stood by and allowed the respondent to incur a liability to the wholesaler for goods received by the appellant for sale in his shop. He indeed has attempted to rely upon the respondent's delay in paying for some of those goods as a ground for repudiating the agreement. It would be quite inconsistent in my view for him to take this stand if there were no binding contractual relationships in existence.

That a contractual relationship was intended and recognised as having come into existence is also, I think, confirmed by the evidence as to his statements to third parties such as the bank manager and the representative of the major supplier of equipment.

The Judge heard all the lengthy evidence adduced and had opportunities of assessing matters of credibility involved and was thus in a better position than I am to form a view on this question, taking account of the evidence as a whole. I must say, however, that the record of the evidence itself, as I have indicated, leaves me in no doubt that he reached the right conclusion on this aspect of the matter.

The second ground advanced as an alternative ground is that there was a breach of an express or implied term of the

contract relating to payment of the wholesalers accounts rendered to the respondent for goods supplied for sale by the appellant and the breach of such condition justified rescission by the appellant. These matters are dealt with in the judgment:

> "The next point relied on by the defendant is that there had been a breach of the agreement by the plaintiff. This contention in my view cannot stand. It never was a term of the agreement that Mr Evans would be in breach of his obligations to such an extent as to justify Mr Adcock's peremptory and unilateral termination of the contract, because one account with one of his suppliers was overdue for a period of one month or even two months or three months, particularly at a time when Mr Evans was on an overseas trip and unable to rectify any difficulty. In this respect I accept fully that any prospective breach of the agreement on that ground was something which was capable of being remedied by Mr Evans. Had he really been aware of Mr Adcock's sensitivity over payment of accounts he may well have adjusted his practice. There is no evidence to suggest that he could not have met payment or negotiated a special credit arrangement with Spaldings to cover temporary financial embarrassment. I do not overlook the fact that he left a cheque with Mr Brown with circumstances that it should not be paid over for a while because of lack of funds at the bank. In this regard Mr Adcock's immediate reaction to the receipt of the account for $2,047.76 was totally out of proportion to any knowledge he really had of the true position concerning Mr Evans's financial stability. The evidence considered indicates that other suppliers of golfing equipment since this time without impediment and the contention that he was then in breach of the agreement because of a relatively chance conversation addressed to him whilst he was taking a bath, must be rejected.
>
> In this regard the law is now codified in the Contractural Remedies Act 1979. The relevant provisions are Sections 7 and 8."

I have considered all the evidence having any bearing on this question and again can find no basis upon which it can properly be said in my view that the Judge reached wrong conclusions. I can certainly find nothing in the evidence to justify

the contention that there can be spelled out any express agreement on this point. The evidence of the appellant indeed indicates clearly that this was a matter that only presented itself to his mind after he had, by chance, become aware that the respondent had allowed one of the accounts to become overdue for payment, or because he had come to suspect that the respondent might be slow in paying his accounts. I am referring here to the evidence to which reference was made about the statements made by the appellant to the respondent while the latter was having a bath. The statement the appellant made, he said, according to his evidence, was:

"You make sure that the accounts are paid."

It is significant, I think, that there is no reference there or in any of the evidence about this particular matter to any actual agreement between the parties with regard to the point. I cannot see, either, that that aspect qualifies as a term which it was necessary should be implied in the contract to make it workable or because if the point had been drawn to their attention the parties would at once have said "of course that is to be implied".

The evidence of Mr Bromley indicates that suppliers of equipment of this kind fully appreciated that owing to seasonal and other factors there would be occasions when customers such as club golf professionals like the respondent would be in difficulties in meeting their accounts promptly on the 20th of the following month. His evidence indeed indicates that it only became a matter of real concern to his company if the accounts went over three months.

There remains the question relating to the quantum of damages. The first concerns the reduction made by the chartered accountant for the 10% discount which the appellant claimed he allowed when making sales of golfing equipment. It is said that the appellant's evidence was that he did allow such a discount on "all major items", that it was the custom to allow such discounts and that the appellant's evidence in this regard was unchallenged. The difficulty the appellant faced regarding this aspect, however, is that there is a positive finding of fact by the trial Judge that the allowing of such discounts, although they might well have been allowed and have promoted greater sales, was not part of the contractual arrangement which he found existed between the parties. I am unable, from my consideration of the recorded evidence, to reach any conclusion that such a finding was against the weight of evidence. The appellant himself giving evidence at the first hearing spoke of retail prices arrived at by adding a fixed percentage mark-up to the cost price as shown by the wholesalers invoices and he said nothing then, so far as I am able to ascertain, about following that up by reducing the figure so reached down again by taking 10% off the retail price so ascertained. He did not then introduce the point about discounts at all and this aspect, indeed, seems clearly, as Mr Guthrie submits, to have been raised for the first time at the second hearing. The same applies as regards the question of deduction of a share of advertising costs from the profit computation before computing the respondent's half share. I am unable to conclude that there is any sufficient ground shown for me to conclude that the Judge was wrong in finding

as a fact that those were no part of the contractual arrangement actually entered into and that, of course, not the reasonableness of any such deduction, is the governing factor.

This leaves only the question as to interest. This question involves quite different considerations. It is a question as to the damage which the respondent can properly be said to have sustained by reason of the repudiation by the appellant of the contract into which it was found he and the respondent had entered. The matter is dealt with thus in the judgment:

> "I now turn to the third item relating to interest. That stems from the part of my judgment at page 10 where I reserved the point of interest in the following terms:
>
> > 'Damages for loss of profit should be assessed over the twelve month period, from June 1980 to June 1981, but that in making that assessment due credit must be given to the defendant for the fact that during that period he did not use the plaintiff's finances nor stock his shop.'
>
> In other words, Mr Evans did not have to carry the expense such as it might be of carrying Mr Adcock's stock. The evidence showed that Mr Evans had very flexible arrangements in regard to financing with his suppliers. He did not in fact pay interest and although there was talk about 'stop lists' because of his longstanding position in the trade he did not suffer any inconvenience, nor was he charged interest for delayed payment on top of his costs for these goods by the wholesale suppliers.
>
> Mr Adcock's accounts, as I understand the cross-examination, indicate that although he carried stock at a much increased level than that contemplated at the commencement of their operation, in actual fact he did not pay bank interest any more than Mr Evans might have charged him interest on bank overdraft in order to finance Mr Adcock's stock. Neither party had applied their mind to such matters at the time of their contractual arrangement. It was a simple arrangement for the sharing of gross profit, or retailer's mark-up, on stock for a period of twelve months - there being

> no provision for individual costs incurred by either party during that period. The parties never applied their minds to any apportionment of the cost of overdraft facilities or other expenses. The arrangement they made was restricted to the sharing of the profit and the calculations should be made accordingly."

Mr Guthrie conceded that there was nothing in the evidence to show exactly from which source the respondent during the period when the arrangements were actually operating paid or proposed to pay for the goods supplied to the appellant's shop or how these purchases would have been financed over the whole period involved. Neither was there any evidence, I find, from which it can be seen exactly how the appellant, when he started to deal direct, financed his purchases except for the fact that there was, as the Judge mentioned, evidently some use by him of overdraft accommodation. The Judge, however, goes on to refer to the fact that such matters were not part of the contractual arrangements and he therefore concludes that the calculations should have been made by the chartered accountant without any provision regarding interest being made. With due respect, it appears to me that this is an erroneous approach because here it is not a question at all of what the contractual terms were, it is a question of the Court assessing the losses which the respondent could properly be said to have actually sustained by reason of the appellant's breach of the contract. What the Court must endeavour to do is to place him in the same position as if the contract had been performed. There can be no doubt to my mind that if the respondent is awarded damages simply on the basis of a computation of 50% of the profits made by the appellant on the sale of goods which were to have been supplied to him in terms of the contract then the respondent is being placed in a much better position than he would have been if the contract had

been performed and that for the very reason to which the Judge adverted in his first judgment. It is not material to my mind as to this question that the respondent had some "flexible arrangements" with suppliers and did not pay interest to the wholesalers on his overdue accounts. The fact remains that he would throughout the period of 12 months been required to provide whatever finance was required to supply stock for the appellant's shop. There was no evidence to show that he would not have had to provide any money of his own throughout the period. All the evidence, indeed, indicates the contrary and that he was fully extended in meeting all his liabilities for supplies including of course those for his own business. The position, I think, is summed up in a phrase in one of the letters of Mr Oakden, the Spalding representative, reporting to his company on the state of the respondent's account and the arrangement with the appellant:

> "Adcock is using John Evans money ... says he is a bit old fashioned over accounts. But likes the idea of using Evans' money all the same."

The amounts involved for payment for stock supplies were in this case, of course, substantial, a lot of the equipment being very expensive equipment. If either of the parties used their own moneys to provide stocking finance instead of bank finance they were, of course, losing the interest which they could otherwise have obtained from that money. The evidence here, as I read it, leaves it entirely unclear just how the parties provided their finance, notwithstanding the lengthy cross-examination of the appellant directed to ascertaining the profits actually made by him on an accretion of assets basis.

The chartered accountant with some detailed knowledge of the workings of a business of the kind here under consideration and opportunity for enquiry deemed it proper for the purpose of an assessment of damage based on the findings in the first judgment to make this deduction and I observe that it was not put to him in cross-examination or by the Court that he was in error in making any allowance under this head. It was only the quantum of his allowance which was attacked.

It is my conclusion that there must indeed be a deduction made to allow for this factor and that the Judge was in error in not so finding. It appears to me that the most satisfactory course is for this Court to make assessment of this item, it being a matter which has to be determined on the basis of the evidence which the parties thought fit to place before the Court. The chartered accountant allowed interest at 16.5% for the period from August 1980 to May 1981 inclusive being the balance of the period of 12 months for which the contract was to operate. He calculated this on a basis of average stock of $25,000 and thus reached the figure of $3,437. Both the interest rate and the stocking figure were the subject of cross-examination. This showed that 16.5% was the rate which the appellant's bank quoted as charged to Mr Adcock. He, of course, as was pointed out, would in all the circumstances have been charged the top rate. The chartered accountant seems to have agreed that the prime rate at the time might well have been only 12%. The real enquiry should, in my view, have been what was a reasonable interest allowance for the provision of finance by the respondent. On all the evidence it appears to me that a figure half way between the 16.5% and the 12% would

be a reasonable assessment for the Court to adopt, i.e. 14.25%. There was also criticism of the $25,000 figure. This certainly seems from Mr Stewart's evidence to have been based simply on two end of month figures, both after the appellant had terminated the arrangements with the respondent. He admitted that he had been unable to verify the figure which he adopted. Mr Guthrie points out that the opening stock figure for the appellant's shop was $9,880 which grew after a few months to $12,051. In April, 1981, it was $28,000. A fair and reasonable assessment in my view to secure an average to apply to the latter period after the breach would be secured by taking the mean of the highest and the lowest figures revealed, i.e. $18,940. On this basis the interest allowance becomes $2,249 in lieu of the figure of $3,437.

I accordingly allow the appeal only to the extent that for the finding that no interest deduction is to be credited to the appellant there be substituted an adjudication that there must be a deduction of $2,249 on this head. The case is remitted to the District Court with the direction that the judgment as now entered is set aside and there is to be substituted a judgment giving effect to the amendment to which I have just referred. The parties, as before, will, I have no doubt, be able to agree on the necessary calculations.

The appellant having succeeded only to this limited extent, I think that the proper course as to costs is simply to allow each party to bear his own costs in this Court. The

costs in the District Court will, of course, be adjusted to accord with the amount for which judgment is now to be entered there.

SOLICITORS:

TONKINSON WOOD & ADAMS BROS. DUNEDIN, FOR APPELLANT.

ANDERSON LLOYD JEAVONS & CO. DUNEDIN, FOR RESPONDENT.