

IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

M.No. 80/83

504

IN THE MATTER of the District Courts
Act 1947

AND

IN THE MATTER of an Appeal from the
Judgment of District
Court Judge H.R.H. Paul
in the District Court
held at Whangarei

BETWEEN THE ATTORNEY GENERAL suing
on behalf of the New Zealand
Government Railways Depart-
ment

Appellant

AND PATRICIA WYNSOME NEWTON
trading as Trixie Newton
Travel, Kerikeri Village
Mall, Kerikeri

Respondent

Hearing: 4 May, 1984.

Counsel: C.P. Ramsdale for Appellant
B.M. Morris for Respondent

Judgment: 4 May, 1984.

(ORAL) JUDGMENT OF VAUTIER, J.

This appeal is brought in respect of a judgment given in the District Court at Whangarei on 16 September, 1983 in respect of a claim by the appellant the Attorney-General suing on behalf of the New Zealand Government Railways Department against the abovenamed respondent. The claim was for the recovery of the sum of \$8,054.01. The Judge, at the conclusion

of the hearing, gave judgment in favour of the respondent.

It is important to note the state of the pleadings upon the basis of which the action proceeded to trial. The appellant in the statement of claim made the following allegations against the respondent:

- (a) That she carried on business as Trixie Newton Travel at Kerikeri;
- (b) That pursuant to a written "Services Agency Agreement" she agreed to sell Road Services tickets and to arrange reservations as required by clients on behalf of the Appellant and to account for payments received for such tickets and reservations to the Appellant.
- (c) Between the 7th day of August 1981 and the 14th day of November 1981 she sold tickets in accordance with the agreement referred to to a value of \$8,054.01.
- (d) She did not pay the sum of \$8,054.01 to the Appellant in terms of the agreement.

The statement of defence filed on behalf of the respondent admitted all these allegations except that there was a denial that she had failed to account for the sum of \$8,054.01 following demand made upon her for that sum. She then pleaded the affirmative defence that all payments due by her to the plaintiff for the period mentioned in the statement of claim had been paid and satisfied by her and this accordingly was the only issue in dispute at the hearing. For this reason it was agreed between counsel that the defendant should begin, the onus of proof being of course on the respondent to

satisfy the Court as to the affirmative defence thus raised by her. With hindsight I think it is a little unfortunate that the appellant's counsel agreed to the matter proceeding in this way, apparently without any opening address, because it resulted in evidence being led which would clearly be rather difficult to understand without the necessary background of facts having been made available to the Court beforehand. I appreciate that in the conditions which pertain as regards the hearing of actions in the District Court it is not often necessary or usually acceptable for any lengthy opening addresses to be made but in this case the evidence of the respondent, which was that given by the witness Mr Lever-Naylor, would certainly be difficult to follow in the way in which it appears on the record. This evidence was the only evidence adduced on behalf of the respondent. The evidence later called on behalf of the appellant showed that the situation and the background of this claim was that there had existed for a considerable time a written sales agency agreement between the Railways Department and the respondent personally, she carrying on business at Kerikeri under the trade name of Trixie Newton Travel. The pleadings, of course, contain the express admission that she was so carrying on business. The subsequent evidence to which I have referred shows, however, that there was also at times relevant to this particular claim a sales agency agreement which had been entered into much more recently by a company called Technical Consultants Limited which agency related to a business in Kaikohe. The evidence of Mr Lever-Naylor showed that at some stage some kind of business relationship appears to have come into existence between the respondent, Patricia Wynsome Newton and this company. That fact is further evidenced

by the reference in the sales agreement to which I have referred in respect of the Kaikohe business including an interpolated reference to the agreement being entered into by "Trixie Newton Travel, a division of Technical Consultants Limited". The agreement produced by the appellant, however, shows clearly that the party that entered into and executed that agreement was Technical Consultants Limited. There seems to have arisen in recent years in this country some attempt to adopt this American-style nomenclature and refer to this term "a division" of a company or corporation, a matter which, of course, may be of some assistance in the operation of large conglomerates in the United States but has no legal relevance whatsoever to the situation existing under our law.

The matter was further developed by the evidence of Mr Lever-Naylor himself who, when asked what position he held in the defendant's business, replied:

"I was the Secretary of the owner-company,
Technical Consultants Limited."

These matters were never explained or developed any further and of course had no relevance on the face of the pleadings. The evidence given by Mr Lever-Naylor also made it clear when viewed in the light of the evidence subsequently called that the agency agreement which Technical Consultants had with the Railways Department for Kaikohe was being run for it there by a Mr Boswinkle. The evidence for the appellant also showed that this Mr Boswinkle had given a cheque to the Railways Department for \$6,016.36 in respect of moneys owed by the Kaikohe agency. He later departed from New Zealand and that cheque was dishonoured.

There was the evidence of an officer of the Railways Department as to his having then approached Mr Lever-Naylor at the Kaikohe agency office and of his having told him that if a replacement cheque was not produced the defendant would have to terminate the agency. He then received a cheque for the amount mentioned. He referred to the fact that the cheque itself bore a note in the handwriting of the drawer indicating that this cheque was in replacement of an earlier cheque. There was evidence from the same witness of a further cheque for \$3,739.34 later paid in respect of the operations of the Kaikohe agency. This cheque, a copy of which as in the case of the cheque previously mentioned, was produced by Mr Lever-Naylor in the course of his evidence, was signed by him. Both cheques were drawn on an account carrying the name Trixie Newton Travel.

Mr Lever-Naylor in his evidence produced a copy of what was described as "New Zealand Railways Road Service and other - final account". This is what is referred to as "the reconciliation statement" in the judgment of the Judge to which I will shortly refer. This statement shows on its face that it purported to bring together the accounts of the defendant's Kerikeri agency business and the agency business to which I have referred operated by Technical Consultants Limited or Mr Boswinkle on its behalf or on his own behalf and to give credit to the defendant for the two payments to which I have referred earlier, namely the cheques for the amounts of \$6,016.36 and \$3,739.34. No attempt is made to disguise the position in that the statement in question designates these two cheques as "paid on behalf of J.C. Boswinkle in his absence" but the sums so designated

are put under the heading "due Trixie Newton Travel Kerikeri". Mr Lever-Naylor's evidence on the matter is quite short and reads as follows:

"Would you explain the significance of that statement and what is it intended to convey? ...The statement was to bring together the total account finalised by the Railways after the contracts were terminated and to show that the moneys owing by Trixie Newton Travel and Technical Consultants had in fact been paid."

Then a little later he said:

"As Secretary and the person responsible for the payments by the Agency to the Railways, what were those payments made in respect of?... They were made in respect of accounts owing by J.C. Boswinkle who was overseas at the time.

Were they made in payment of the matters in substance of this claim?...Not in the initial satisfaction but in the reconciliation account they were credited to that account by me. That is why I set out the reconciliation account for the Department."

It is made clear that Mr Lever-Naylor was simply, by this so-called reconciliation statement, attempting to re-appropriate the amounts which had clearly been paid to the Railways Department in respect of the debts owing by Technical Consultants Limited or Mr Boswinkle in respect of the Kaikohe agency and credit them to the defendant. It was in this way, indeed, even sought to demonstrate that the Railways Department now owed the defendant the sum of \$4,431.11. There was no evidence whatsoever adduced to show that the Railways Department ever agreed to such re-appropriation of these payments. The only reasons given by the Judge for finding in favour of the respondent are as follows:

"The plaintiff claims the sum of \$8,054.01 against the defendant who quite simply says that that sum has been paid and is incorporated in payments made to the Railways Department as shown in a reconciliation statement produced by Mr Lever-Naylor.

I have been unable to see how it is that the Railways Department cannot accept that reconciliation. It is of course for the plaintiff to prove its case against the defendant. It has not been able to do so in my view, and it follows there will be judgment for the defendant on the plaintiff's claim."

It must be noted with respect to the learned Judge's reasons that he, of course, has overlooked that in respect of the only matter in issue in the proceedings, that is whether the defendant had discharged her debt, the onus was on her and not on the plaintiff, as both counsel had acknowledged right at the outset. The confusion of thought indicated in the evidence presented by Mr Lever-Naylor indeed seems to have arisen through his having no appreciation of the difference between a person carrying on business as an individual whether in his own name or under a trade name, and a limited company. He seems in his evidence to have thought that all three situations could be indiscriminately intermingled. Be that as it may, the evidence before the Court showed quite clearly that there was never any agreement or acquiescence on the part of the Railways Department to treat the Kaikohe agency in respect of which the company mentioned had entered into the agreement and the defendant's Kerikeri agency as one. The rather ironic point, of course, is that if it was the situation that the defendant was to be regarded as operating the Kaikohe agency and that the whole matter was to be treated as one account, as Mr Lever-Naylor seems to have tried to contend,

the result would be that the respondent would be liable for the outstanding accounts in respect of the Kaikohe agency and this she obviously does not accept to be the position.

In these circumstances the appeal must be allowed and the matter is remitted to the District Court at Whangarei with the direction that judgment be entered for the plaintiff in that Court for the sum of \$8,054.01 together with the appropriate scale costs in respect of the hearing in that Court and disbursements and witnesses expenses to be fixed by the Registrar.

The appellant is entitled to the costs of the appeal and I fix these in the sum of \$250.

A handwritten signature in dark ink, appearing to be 'C. W. Smith', is written in a cursive style.

SOLICITORS:

Marsden Woods Inskip & Smith, Whangarei, for Appellant.

B.N. Morris, Takapuna, for Respondent.