IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

No. M.122/83

BETWEEN JEFFREY DIBBEN
Appellant

A N D RICHARD FERRIS
Respondent

Hearing: 18 October 1984

Counsel: A.J. Moore for Appellant
F.M. Farr for Respondent

Judgment: 18 October 1984

ORAL JUDGMENT OF HOLLAND, J.

The appellant, who is a whitebaiter resident at Haast, appeals against a judgment given in the District Court at Dunedin on 1 July 1983 dismissing his claim for $2,203 being the balance of the purchase price in respect of whitebait which he alleged he sold to the respondent in November 1981. The respondent apparently had some experience on the West Coast, first working in a sawmill, but later deciding that he would capitalise on the whitebait season on the West Coast by buying whitebait and delivering it for sale in Dunedin. The District Court Judge found that on 10 November 1981 the appellant sold him 214.5 kilograms of whitebait at a price of $14 per kilogram. The evidence of the respondent was that when this whitebait was attempted to be sold in Dunedin it was "off", in other words being unfit for human consumption. Apparently some whitebait was sold for $1,020 and of these proceeds of sale the respondent paid the appellant $800. The claim was in respect of the balance.

Considerable confusion was added to this case by the allegation of the respondent that he did not in fact

purchase the whitebait at all. He maintained that he was merely acting as the appellant's agent in selling the appellant's whitebait in Dunedin. The District Court Judge found, and it is clear from the evidence that it was the only possible finding, that the contractual relationship between the appellant and respondent was one of vendor and purchaser. The appellant was willing to sell whitebait at $13 per kilogram if it was paid in cash, but agreed with the respondent that for an increased price of $1 per kilogram, so as to make the price $14 per kilogram, the respondent could pay him after he had sold the whitebait in Dunedin. The respondent, by way of alternative defence, alleged that if there were a sale then it was a term of the sale that the whitebait was fresh, chilled and drained and that the whitebait in question did not comply with that term. The confusion arose because it was difficult to see how, if the respondent was merely acting as the appellant's agent, he would have the concern about the terms in contracts as to the fitness of the goods which he had to rely on in his alternative defence.

The District Court Judge quite correctly in his judgment has referred to the fact that the matter is controlled by the Sale of Goods Act. It would appear, however, from his finding that he did find that it was a term of the contract that the whitebait was "fresh". What is meant by "fresh" was not precisely defined, but certainly from the evidence of both the appellant and the respondent and their witnesses it appears that "fresh" means having been caught and chilled and kept chilled for up to a week, or at least having been kept chilled for a period that would enable it, while the whitebait was still chilled, to be moved to a market place

in Dunedin or Christchurch for sale. The District Court Judge found not only that the whitebait at the time of the sale was not "fresh", but he also found that there was a breach of section 16(b) of the Sale of Goods Act 1908, that the whitebait was not of merchantable quality. The issue is essentially one of fact.

The District Court Judge in his judgment said:-

> "There is in this case quite a conflict in the evidence. I have to say at the outset that I am left with reservations about the evidence given by witnesses on both sides. I certainly accept that where witnesses are being asked to recall matters contained in conversations eighteen months after the event there is clearly room for error in recollection, but more importantly there is the temptation to reconstruct, in what appears to the witness to be a logical form, matters to which they are testifying. I do not consider that any witness has deliberately mislead the Court, but I have doubts as to the credibility on .. fine points principally on the grounds of accuracy but also because of reconstruction, according to self-interest."

In the light of that conclusion by the District Court, which I do not find surprising having read the full notes of evidence, the findings of fact which he has made are not entitled to the same degree of inviability that is generally said in relation to specific findings of fact where the District Court Judge has seen and heard the witnesses and decided who he believes and who he does not believe.

I propose to deal first with the provisions in relation to the Sale of Goods Act. The District Court Judge in referring to the implied term of "merchantable quality" failed to refer specifically in his judgment to the fact that section 16(b) of the Sale of Goods Act 1908, which implies that term, implies it only where goods are bought by description from a seller who deals in goods of that

description. I accept the submission of counsel for the appellant that in this case the evidence does not show that there was a sale of goods by description. The circumstances are that the respondent was offered this large quantity of whitebait as a specific item. He went over to the West Coast for the purpose of purchasing it. He examined it and he agreed to buy it, and in those circumstances there cannot be said to have been a purchase of goods by description within the meaning of section 16(b) of the Act.

Counsel for the respondent, in endeavouring to uphold the judgment, apparently recognised the possible weakness of relying on section 16(b) by arguing that if section 16(b) did not apply then the provisions of section 16(a) would apply where there is an implied condition that the goods shall be reasonably fit for the purpose for which the goods were acquired. It is clearly established here that the goods were acquired by the respondent for the purpose of transporting them to Dunedin and selling them to fish resellers in Dunedin. The evidence does not, however, establish that the sale of whitebait was in the course of the appellant's business to supply. The appellant's father was in the business of buying and selling whitebait but the appellant who conducted this sale was a whitebaiter and it is of course correct that he caught his whitebait for the purpose of selling it, and he sold whitebait from time to time, but the evidence does not show that it was the course of his business to supply whitebait. His business was to catch it and as an incidental part of catching it he then sold it. In any event, however, there is no evidence to show that at the time of the purchase the respondent was relying on the appellant's skill or judgment.

I am accordingly of the view that no grounds exist for applying the implied terms under the Sale of Goods Act 1908.

The District Court Judge refers in his judgment to the time when the risk passed and says that in this particular case that he should depart from the application of the general rule concerning risk passing with the property and find that the risk in the goods remained with the appellant as seller for a reasonable period to enable the goods to be transported to Dunedin. It was submitted by counsel for the respondent that all that the District Court Judge meant there was in relation to merchantable quality. It was submitted that what he was really meaning was that goods of the nature of whitebait in the circumstances of this sale to be of merchantable quality would have had to have been fit for sale and human consumption, not only at the time of the sale but also to have remained in that condition for a reasonable period to have enabled them to have been transported to Dunedin for sale. With respect to the District Court Judge, the latter view must clearly be correct, but if the District Court Judge was finding that the actual risk of damage or deterioration in the goods remained with the vendor after the sale it is contrary to all the provisions of the Sale of Goods Act. The matter is covered by sections 19 and 20 of the Sale of Goods Act. Here there was an unconditional contract for the sale of specific goods in a deliverable state and there is no ground for departing from the general rule that the property in the goods passes to the buyer when the contract is made, particularly when at that stage delivery was handed over at the same time, and the provision of section 22 of the Sale of Goods Act that risk

passes with property. The only ground of defence left to the respondent was the breach of the term that the whitebait was to be "fresh".

The respondent submitted to this Court that the breach entitled repudiation. Counsel submitted that the Contractual Remedies Act 1979 did not apply to the Sale of Goods Act. He appears to have overlooked section 4(3) of the Contractual Remedies Act which provides:-

> "Notwithstanding anything in section 56 or section 62 of the Sale of Goods Act 1908, this section shall apply to contracts for the sale of goods".

That is probably not material in the light of this case because although he submitted that the appellant had repudiated the contract he is not debarred from a remedy if there has been a breach of the term of the contract. The question is has he established that there has been such a breach. The evidence is that when the whitebait was sold to the respondent it had been purchased by the appellant's principal at the very earliest 36 hours before, possibly a little longer, or a lot longer. It simply is not known. The whitebait had been in a chiller at least overnight prior to the purchase. The respondent purchased the whitebait and then placed it in a freezer in South Westland where it remained again for, at the very least, 48 hours. There is a dispute as to whether it was longer or not. The respondent in evidence says that he purchased the whitebait on a Tuesday and in a misguided moment says he went whitebaiting for the rest of the week. In another passage he says he left the West Coast in the early hours of Friday morning or late on Thursday night to sell the whitebait on Friday. In any event, he did not immediately transport the whitebait for sale. The respondent has proved that when he

went to sell the whitebait it was unfit for human consumption. There is evidence that he had adopted a procedure of this type before on several occasions and the whitebait had not apparently deteriorated.

The District Court Judge has found that the whitebait was not fresh. With respect, I am satisfied that there was no satisfactory evidence on which he could reach that conclusion. He does not define what he meant by "fresh". If his finding was that it was not fresh in the way that would ordinarily be understood as having been immediately caught then the finding is undoubtedly correct, but that clearly was not the meaning applied to "fresh" by either of the parties because it was known that the whitebait had been chilled. I am therefore of the view that in the use of the word "fresh" the only meaning that could be ascribed to it was that it had been so recently caught prior to being chilled that it could be sold and later delivered to Dunedin for sale without going "off". It is somewhat surprising that the evidence seemed to be unanimous that anything up to a week would still have kept this whitebait as being "fresh". It is not known when the whitebait was caught. It may well be that the respondent thought that the appellant himself had caught it. In fact he did not. Adequate enquiry prior to going to hearing would have revealed this information. The respondent complains that the appellant did not call the person from whom he bought the whitebait to prove when it was caught. The onus of establishing that it was not fresh was on the respondent and that person should have been called by the respondent. It has simply not been proved when the whitebait was caught. It has been proved that the respondent inspected it. The degree and extent of that

inspection is disputed and has not been specifically resolved by the District Court Judge. But there seems to be little doubt that the whitebait was not "off" at the time of sale. The District Court Judge can only have found that it was not "fresh" by applying a process of reasoning that because in the past the respondent had purchased whitebait, placed it in the freezer and not immediately delivered it to Dunedin and had then delivered the whitebait in good condition that this was not "fresh". There are too many imponderables in this. What was the temperature of the freezer in which the whitebait was stored by the respondent? Was it in fact frozen rather than chilled? Having been either frozen or chilled did it thaw out? How was it transported to the chiller? How was it transported from the chiller or freezer to Dunedin? In what sort of vehicle? What condition was it in when it was taken out of the freezer? In order to be satisfied that it was not "fresh" the Court would have to have been satisfied first on reliable evidence that a period up to a week was not too much for the keeping of whitebait and that during the period that the whitebait was in the possession and at the risk of the respondent it was properly maintained and nothing else occurred which could have caused it to deteriorate.

There may be an element of bad luck from the point of view of the respondent in this because I share the District Court Judge's concern as to whether the whole and accurate truth has come before the Court. I am satisfied, however, that beyond doubt the sale was proved and that the condition of the whitebait at the time of the sale has not been proved. In those circumstances there is no doubt but that the appellant is entitled to judgment.

The appeal will be allowed and judgment will be entered for the appellant for the amount claimed, together with costs, disbursements and witness expenses according to scale in the District Court. As to costs on the appeal, the appellant has failed to comply with the Practice Note contained in (1970) N.Z.L.R. 1140 which requires points on appeal to be filed and served within two clear days of the hearing. For that reason I do not propose to allow costs on the appeal.

C. D. Holland J