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IN THE HIGH COURT OF NEW ZEALAND
TIMARU REGISTRY

GR 9/83

BETWEEN MICHAEL GAVAN of Timaru, Manager

Appellant

1203

A N D REESE BROTHERS LIMITED a duly incorporated company having its registered office at Christchurch and carrying on business as a contractor

Respondent

Hearing: 18 July 1984

Counsel: J.L.D. Wallace for Appellant
M.J. Leggat for Respondent

Judgment: 26/7/84

JUDGMENT OF ROPER J.

This is an appeal in civil proceedings in which the Appellant was the Defendant in the Court below.

The Respondent company claimed that on or about the 7th December 1981 an agreement was concluded with the Appellant whereby the Respondent was to supply and lay "Armourflor" floor covering in the Appellant's shop premises for a price of $4,999, and that to fulfill its obligations under the agreement the Respondent purchased the floor covering for $3,261 but the Appellant then repudiated the agreement. The claim was for the sum of $3,261, or any loss the Respondent might suffer on resale of the flooring. The defence was a denial that there had been a concluded agreement. The trial Judge held that there was an agreement and that the Appellant was in breach and awarded damages of $1,000 on this basis:-

> " The figures were not detailed in full. However, the evidence shows that the profit on the Armourflor would be about $7.00 per linear metre, or approximately $680.00 in all, and there would also be some profit on the laying of the material.
>
> I will assess the plaintiff's loss at the figure of $1,000.00."

The grounds of appeal are that the Respondent did not establish a binding agreement on the evidence; or if it did then it was not with the Appellant but with M. Gavan (Washdyke Dairy) Ltd; and that in any event the damages of $1,000 were incorrectly assessed. The second ground of appeal can be disposed of in a few words. All the negotiations were carried out by the Appellant in person. The Respondent's employees had no knowledge of the Appellant's company, and the Appellant agreed that he had not mentioned its existence at any time.

These are the facts. Late in 1981 Mr Harrison, the Timaru Manager of the Respondent company, became aware that J. Rattray & Son Ltd was erecting a block of shops at Washdyke, and with an eye to business contacted a Mr Booth of Rattray's concerning the supply of floor coverings. Mr Booth and Mr Gavan who was to be the tenant of one of the shops, called on Mr Harrison in November. They wanted a covering that would be easy to maintain and capable of taking heavy use and showed a preference for "Armourflor", a toughened lino. They asked for a quote for the job in "Armourflor" and in alternative coverings. Mr Harrison measured the premises and left his prices and samples of the various coverings with one of Mr Gavan's assistants at his old shop. Mr Gavan went to see Mr Harrison on the 7th December, told him which sample he preferred and said that the job would have to be done before Christmas. Mr Harrison then ordered the floor covering from Christchurch, and later in December went on leave, not returning until the 20th January. Sometime in December, and presumably after Mr Harrison had gone on leave, Mr Gavan called at Reese's and spoke to a Mr Murphy. He told Mr Murphy that

the roof of the building was going on and the floor covering would be required before Christmas. Mr Gavan had no real recollection of that discussion. As a result of what he was told Mr Murphy made a notation in the firm's order book which I believe was "Washdyke Dairy" with a question mark which was Mr Murphy's way of expressing doubt as to when the job would be done. According to Mr Gavan he had not placed any firm order for the job up to that point, and was simply seeking competitive quotes with an assurance that the material would be available and the job could be done before Christmas.

When Mr Harrison returned from leave he found that the job had not been done presumably because the builders had not finished before Christmas as anticipated. On or about the 5th February Mr Booth told Mr Harrison that his price was too high and as a result Mr Harrison checked his measurements of the shop and presented a revised quotation which Mr Booth again rejected as being higher than another quotation he had received. At a later stage Mr Harrison presented a third quotation on the basis of an inferior quality of floor covering. That was not accepted and shortly thereafter Mr Harrison found that the job had been done by another firm.

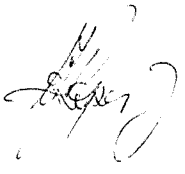
The learned District Court Judge dealt with the question of the revised quotations in this way:-

> " Mr Wallace also suggested that the two subsequent offers made by Mr Harrison on 5th February 1982 had the effect of releasing Mr Gavan from the contract previously made. If either of those offers had been accepted by the defendant, there would have been a novation substituting a new contract for the original one. But no new contract was made, so there was no discharge of the original liability."

According to Mr Wallace the Trial Judge misunderstood his submission in that at no stage had he relied on novation, or for that matter frustration following the builders' delay in completing the premises. His submission simply was that the

presentation of revised prices when told that the first quotation was too high was inconsistent with an earlier concluded agreement. I am bound to agree with Mr Wallace's submission. I think the position was that the Respondent failed to prove on balance that there was a concluded agreement on or about the 7th December. The evidence is equivocal. It might be consistent with a concluded agreement or merely the seeking of a quotation with an assurance that if the quotation was accepted the materials would be available to enable the job to be done before Christmas. If anything, the presentation of revised quotations favours the latter interpretation. Being satisfied that there was no concluded agreement it is unnecessary to consider Mr Wallace's submissions on damages.

The appeal is allowed with costs of $150 and costs to the Respondent in the lower Court as fixed by the Registrar.



Solicitors:
Gresson, Richards, Mackenzie & Wallace, Timaru, for Appellant
Weston, Ward & Lascelles, Christchurch, for Respondent