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IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.81/85

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BETWEEN ELLISON TRADING LIMITED a duly
incorporated company having
its registered office at
Hamilton, Importers and
Distributors

Appellant

AND WILLIAM GEURTS of Hamilton,
Salesman

Respondent

Hearing: 26 September 1985

Counsel: R Wilson for the Appellant
R P Boast for the Respondent

Judgment: -4 OCT 1985

JUDGMENT OF BISSON J

In his amended statement of claim the respondent alleged that in July 1978 he entered into an agreement with the defendant company through its director Mr L E Ellison to act on a self employed basis as agent for the appellant in the sale of excavating machinery on behalf of the appellant. He claimed that commission was due and owing to him. He listed eight

transactions by name setting out the sale price in each case and the rate of commission which amounted to a total of \$11,115.18. After allowing for a payment of \$600.00 received on 31 May 1983 the balance of unpaid commission claimed amounted to \$10,515.18. In its amended statement of defence to the amended statement of claim, the appellant denied any agreement to pay commission at the rates claimed and said that after May 1982 any sales could only be in terms of a memorandum dated 12 May 1982. Accordingly it denied that the amount claimed was owing.

The respondent is now a retired salesman, 70 years of age who, in July 1978 after his retirement as a salesman of heavy machinery for C B Norwood Ltd entered into an oral agreement with the appellant to act as a salesman on commission in respect of the sale of its heavy machinery. He said that the rates of commission were to be 2.5% on new machinery and 5% on second hand machinery. The respondent said there were also discussions about commissions payable in respect of transactions in which he was involved but in respect to which he did not actually make a sale and he referred to the receiving of what was called "a spotter's commission". The respondent did not receive any salary or retainer but a vehicle with petrol was provided for him and his toll calls were paid by the appellant. The respondent continued working as a sales representative for the appellant for approximately five years.

Witnesses for the respondent were heard on 16 July 1984 and witnesses for the appellant heard on 6 November 1984. In a reserved decision the learned District Court Judge traversed the lengthy evidence considering each transaction separately and deciding whether or not commission was payable he held that there was no agreement reached in May 1982 for new rates of commission to apply to future sales. The appellant has appealed in respect of one transaction only, namely that in respect of the sale to Mr A M Emmett in about July 1983 of a new Liebherr 721 Bulldozer for \$171,173.67, commission at 2.5% amounting to \$4279.34 was payable. (I note that \$171,173.67 is the price to Emmett whereas commission on new machines was to be based on the ex-factory price.). The appellant has submitted that only a spotter's commission is payable in respect of this sale because the part played by the respondent in respect of the transaction did not entitle him to a full commission and in any event if he were entitled to a full commission then the commission rate of 1.5% set out in the memorandum of May 1982 applied.

This memorandum was typed by Mrs Ellison who is also a director of the appellant and has been employed by it in secretarial functions for 10 or 12 years. It reads as follows:

"ELLISON TRADING LTD
Importers & Distributors

12th May 1982.

Sales Commission paid by ETL.

New Sales:

1 1/2% commission paid on new sales subject to:

- (1) Commission only paid on Ex Works price.
- (2) Commission only payable at above rate when no trade-in or salesman has made other arrangements relating to trade-in.

Trade-in units:

1 1/2% commission paid when salesman has sold trade-in for cost price and ETL have received all monies. Any variance from above commission by negotiation with ETL in each individual case.

Spotters commission:

When ETL introduce salesman to customer and ETL have to finalise sale, take trade-in, finance etc then the salesman will only be paid a spotters commission agreed on each individual case.

Customer on behalf of machines:

ETL will negotiate in each case a commission for salesman if they sell a machine belonging to a customer. The customer will be responsible to pay this commission to salesman."

The learned Judge held that no agreement had been reached between the parties in terms of that memorandum. In the absence of any new agreement he held that the original rates agreed to in July 1978 still applied. However, I do not need to consider whether or not the May 1982 memorandum applied to the Emmett transaction as I have reached the conclusion that the appeal must succeed on Mr Wilson's argument that the respondent is entitled only to a spotters commission on that sale.

The learned Judge reviewed the evidence relating to the Emmett sale as follows:

"The Plaintiff deposed that Mr Emmett was a long standing client of his for many years. He was interested in a new Liebherr bulldozer, and came to Hamilton with his wife and children. With the Plaintiff, they all went to Auckland to see Mr Dickson's machine. Mr Dickson demonstrated it, Mr Emmett was quite pleased with it, and on the same date, back in Hamilton, informed the Plaintiff he had decided to buy one of those machines. The Plaintiff inspected the proposed trade in at Oparau. He did not have any further involvement with the transaction, and left the matter in the hands of the Defendant, as the machine had to be imported from Germany."

"Mr Emmett was called. He said he went to Mr Ellison with a proposition to buy a Liebherr 721 bulldozer. Initially he went to Ellison's yard and Mrs Ellison was present. Her husband was overseas. She said she could not do anything until he had returned. He waited until he had returned and then saw Mr Ellison with his proposition. He had a discussion with Mr Ellison at which Mr Geurts was present. Mr Geurts became involved. Apart from being present at the meeting, he had other contact with the witness. This other contact was when he accompanied the witness and his family to Cleveland to see Mr Dickson. The Plaintiff introduced Mr Dickson, and he spent some time driving the Liebherr and talking to him about it. The meeting lasted an hour and a half to two hours. Mr Geurts later travelled out to his district to get the cheque for the deposit. The final price was \$171,173.00. In cross-examination, the witness acknowledged that he had made a direct approach to Ellison Trading and not through someone else. He had agreed to buy a Liebherr from the Defendant, before he became aware of Mr Geurts existence. The Plaintiff had travelled to Cleveland in his car."

(Mr Ellison's evidence)

"Mr Geurts' only involvement arose from his hanging around the Defendant's place of work. Mr Geurts was asked to take Emmett to view Dickson's machine and did so. The following day the Plaintiff was asked to pick up an envelope from Mr Emmett and did so."

(Mrs Ellison's evidence)

"She recalls the first visit of Mr Emmett to the premises, and her telling him her husband was absent on that day, and him replying that he wished to purchase a new Liebherr. Mr Emmett later came back to see her husband. In cross-examination she said that when Mr Emmett came to the office, Mr Geurts was in the workshop. After that, either she took Mr Emmett over to

the Plaintiff, and said can you tell Mr Emmett something about the bulldozer, or, somehow or other, Mr Emmett came to be taken to Mr Geurts. Mr Emmett was taken over to get some brochures concerning the bulldozer."

Mr Ellison admitted when questioned by the Judge that the respondent was entitled to a payment of \$250.00 in respect of the sale to Emmett and Mr Wilson conceded on the appeal that the respondent was entitled to a spotter's commission on the sale to Emmett. It is to be noted that when the respondent gave to Mrs Ellison on 31 May 1983 a list of five transactions on which he claimed commissions, the list included "spotter's commission" in respect of the Emmett and Sutton sales. In my view it is highly significant that the respondent should in this list himself specify a spotter's commission in two cases and not in others. This indicates that there is some difference in the rate of commission payable otherwise there would be no occasion to refer in some cases to a "spotter's commission". The respondent was re-examined by Mr Bates regarding the Sutton and Emmett sales as follows:

- "Q. You are claiming it (commission) in respect of only that you were a spotter in each case?
- A. I could not do anything else.
- Q. In terms of the original agreement between you and Mr Ellison you say the same percentage was available for a spotter's commission as for sale?
- A. That is correct."

The learned Judge held that the respondent was entitled to a commission on the Emmett sale of a new machine at the rate of 2.5% on the basis of his having procured Emmett as a purchaser. That is to say the learned Judge did not find that the respondent was entitled to a spotter's commission. With the greatest respect to the learned Judge this finding is not supported by the evidence and as this issue does not turn on credibility I feel justified in reversing his decision as the respondent himself claimed on re-examination a spotter's commission on the Emmett sale and this is consistent with the evidence of Mr Emmett and Mrs Ellison that the former's first approach was not to the respondent.

The next matter for determination is the amount or rate of a spotters commission. In his evidence in chief the respondent, after referring to the rate of commission of 2.5% for the sale of new machinery and 5% for used machinery went on to mention entitlement in some cases to a spotters commission but did not mention any fixed rate. It was only on cross-examination that he referred to a rate of 2.5% for spotter's commission. The learned Judge did not accept that evidence. He held as follows:

"I deal now with the question of spotter's commission. I have already summarised the evidence relating to that aspect. Payment at all, much less of any particular amount, seems to be a 'grace and favour' matter, if I may so describe it."

This finding accords with the evidence of Mr Ellison and Mr R H Wade, a motor vehicle dealer for 20 odd years in the Waikato. Furthermore, on the balance of probabilities the full commission rate of 2.5% on new machinery would not also apply to a spotters commission.

Accordingly, the appeal is allowed and I hold that the respondent is entitled to the sum of \$250.00 by way of a spotter's commission on the Emmett sale, there being no evidence to support any other amount for that commission. The case is referred back to the District Court for judgment to be varied and entered in accordance with this judgment. Costs of \$500.00 are awarded to the appellant.

C. B. Brown

Solicitors for Appellant:

Swarbrick Dixon & Partners
Hamilton

Solicitors for Respondent:

Stace Hammond Grace & Partners
Hamilton