



BETWEEN JOHN GOODMAN & CO. LTD

Plaintiff

A N D APEX COMPUTER SYSTEMS

First Defendant

A N D STEPHEN ROB GIBSON and  
CLARENCE WILBERT LUMPKIN

Second Defendants

Hearing: 10 & 11 February 1987

Counsel: Judd for Plaintiff  
Cato for Defendants

Judgment: 9 MARCH 1987

JUDGMENT OF SINCLAIR, J.

This action was commenced by the Plaintiff against the Defendants claiming very substantial ~~damages~~ alleged to be due as a result of the supply to it by the First Defendant of a computer which, it was said, was not fit for the purposes for which it was supplied with the result that considerable losses were sustained by the Plaintiff. The Defendants denied the Plaintiff's allegations and in particular alleged that there had been a contract of accord and satisfaction entered into in or about the months of August and September 1983 the terms of which were set forth in paragraph 27 of a statement of further particulars in relation to this special plea. Paragraph 27 reads as follows:-

"27. In or about the months of August and September 1983 the Plaintiff and the Defendants entered into a

contract of accord and satisfaction containing the following oral terms:-

- (i) That the First Defendant would supply to the Plaintiff a new replacement 11/23+ computer, a MSV11 256KB Memory Module, a DLV11J communications module, a 40 M.B. Winchester Disk Drive and a magnetic tape cassette drive.
- (ii) That the existing 11/23 computer already supplied by the First Defendant to the Plaintiff would be returned to the First Defendant.
- (iii) That the replacement 11/23+ computer and accessories would be installed at the Plaintiffs' premises and utilised by the Plaintiff in its business.
- (iv) That the Defendant would provide the new equipment described in paragraph 27 (i) above and the maintenance for the new equipment as part of an ongoing commercial relationship between the parties.
- (v) That the supplying of the replacement 11/23+ computer and accessories and the removal of the existing 11/23 computer would be without cost to the Plaintiff."

It was then alleged by the Defendants that the obligations undertaken by them (and which are above referred to) would release them from any liability to the Plaintiff in respect of the contract for the first computer which was entered into in the month of March 1982. The Defendants went on to say that in November 1983, the Defendants were informed by the Plaintiff that the Plaintiff no longer intended to use the new computer but instead intended to use a Qantel computer with the result that the Defendants were denied the opportunity of an ongoing commercial relationship with the Plaintiff. The Defendant cancelled the accord and did not deliver the new computer, the Defendants claiming that because of the Plaintiff's conduct they were discharged from the contract of accord and all other obligations to the Plaintiff.

In view of the nature of the defence raised it was agreed that the Court should firstly embark on an enquiry as to whether there had been a settlement of the dispute between the parties and if so, whether in all the circumstances the parties were still bound by the terms of that settlement; if not, then it would become necessary to decide how the action should then proceed. Accordingly I embarked on a hearing of this particular aspect of the matter and by arrangement between the parties the Defendants put their case first.

The evidence is within a very short compass and much of it I need not refer to as there was a considerable degree of consensus between the parties they diverging really in only two particular areas. When referring to the issues involved, Mr Judd really highlighted the areas which were to be covered by the evidence and the first area was whether there was an agreement at all with Mr Judd conceding that the answer to that question was in all the circumstances in the affirmative. The next and most important aspect was to define the terms of the two essential areas of dispute namely whether there was an agreement between the parties as to whether the new computer (which I will refer to shortly) which was to be delivered was to be used by the Plaintiff and if so whether the First Defendant would have an ongoing commercial relationship in providing maintenance services in respect of the hardware of the computer. It is, in essence, these two latter areas where there is a dispute between the parties because it seemed to me that there was substantial agreement between the parties that an agreement had been reached for the supply by the First

Defendant to the Plaintiff of a new computer. The dispute arose as to whether there were any incidental terms of that contract of settlement and if so, were the above two matters to which I have just referred included as terms of the settlement.

The first witness was Mr Gibson who was a Director of the First Defendant and, of course, one of the Second Defendants. He acknowledged that his company had supplied to the Plaintiff a 11/23 digital computer but that it had a Winchester drive which, as I understand the evidence, was necessary to provide for 40 megabytes of disc space. In addition there was supplied software said to be suitable for the Plaintiff's business but it is evident from the complaints of the Plaintiff that the latter had considerable misgivings in relation to the performance of the computer and as a result, in 1983, the Plaintiff consulted its solicitors and a letter dated 29 July 1983 was written by the Plaintiff's solicitors to the Defendant company. At that time it appeared that there was a claim being made for damages in excess of \$127,000. After some correspondence, a meeting was arranged between Mr Gibson on the one hand, and Mr Bakker, Mr Lerner and Mr Waite on the other. At that meeting, Mr Gibson acknowledged that Mr Bakker conceded he did not want to continue with the Apex software because it had given rise to problems and was not, in Mr Bakker's view, suitable for his company. According to Mr Gibson, Mr Bakker conceded that the Plaintiff wished to use a new software pattern which belonged to a firm called Letraset in Australia which was a firm with which the Plaintiff did considerable

business and that Letraset's programs had been running for many years without problems and the Plaintiff felt it could make the best use of Letraset's programs if it had a bigger and better computer. Mr Gibson acknowledged that he was disappointed that the Plaintiff was going to abandon the Apex software particularly as there had been an acknowledgement that for approximately three weeks prior to the date of this meeting, the Apex computer had functioned with little or no problems. However, Mr Gibson conceded that Mr Bakker had put forward a very solid argument as to the suitability of the Letraset software and felt the proposal that his company supply a new computer in place of the old one was a good way to settle the dispute and he stated in his evidence at page 6 that he considered his firm would have an ongoing relationship with the Plaintiff in a much smaller capacity but that that ongoing relationship was important to Apex as it was only a small company with a small number of customers. He acknowledged that the ongoing relationship, as he saw it, would simply relate to the engineering parts as the software would, of course, be provided by Letraset. At that meeting on 30 August 1983, according to Mr Gibson, he said that Apex could, and would, provide maintenance on the new computer - if Apex decided to provide it. When asked whether there was any response to that statement, he simply stated that it was acknowledged by Mr Bakker. On that particular day, at the conclusion of the meeting, Mr Gibson stated that he had to discuss the matter with his co-director. However, some minutes were signed to the effect that after having consulted with his co-director Mr Gibson would put forward a firm proposal by Thursday

1 September 1983. That was duly done and the essence of a telephone conversation which took place between Mr Gibson and Mr Bakker on that date was to the effect that Apex would supply the 11/23+ computer and a new version of the TSX+ operating system and that Apex would supply ongoing maintenance but would not be responsible for the software at all. In due course Mr Bakker replied by letter dated 6 September 1983 in the following terms, and I quote a portion of the letter:-

"Further to our discussions last week and the decisions reached, we are now pleased to confirm that our company would be very happy to accept your offer to change the computer originally supplied by your company for a new Standard DEC 11/23+ Computer with a 256K memory and 40 megabytes of disc space and cassettes.

According to the programmer of Letraset Australia, who rang us today, the programmes instituted by him for his company can best be implemented on the machine mentioned above.

It would be appreciated therefore if you can now go ahead and order this equipment as soon as possible and advise us when we can expect delivery so that we can implement our plans."

It is to be noted that there is reference in that letter to a new Standard DEC - the letters "DEC" referring to equipment manufactured by Digital Equipment Company Limited. Upon receipt of that letter, Mr Gibson reacted by lodging the necessary orders and there were some further discussions which took place particularly in relation to delivery dates and on 22 September 1983, Mr Gibson wrote to Mr Bakker, and I set out the full content of that letter:-

"This letter is to confirm the substance of the recent discussions between our two companies relating to your installation."

1. We understand your desire to move on to compatible software to be supplied by your associate company in Australia. We will naturally supply whatever support we can to you to assist you in the software transition.
2. Apex is prepared to replace your current computer (excluding terminals) with a brand new LSI 11/23+ computer. As discussed with Malcolm Lerner, Russell Waite and yourself, it is not possible for us to purchase a similar configuration as your current one directly from Digital Equipment Limited. Our offer to you is for a Winchester based system comprised of the following components:
  - (a) A Standard Digital LSI 11/23+ Computer
  - (b) A Standard Digital MSV11 256KB Memory Module
  - (c) A Standard Digital DLV11J Communications Module
  - (d) A 40MB Winchester Disc Drive which appears to the software as Standard Digital RL02 Drives
  - (e) A Magnetic Tape Cassette Drive which appears to the software as a Standard Digital TSV05 Tape Drive.
3. This will provide you with a considerably more powerful computer than you currently have. It can expand up to four Megabytes of main memory and can be upgraded for remote communications using any Digital or Digital compatible terminal. It is capable of having a CPM card installed for future processing of the wide range of CPM based programs.
4. Your software people will be able to cross load the new software and files from other Digital equipment using the Cassette Drive which accepts Digital's Cassettes. This will also allow you to load any Digital supplied software in the future.
5. Your back-ups now and in the future, will be able to be carried out automatically using the tape cassette drive.
6. The new system will be licensed as is your present machine for RT<sup>2</sup> ( a run time version of RT11) and for TSX+ capable of addressing and utilising up to four megabytes of memory.
7. It will be necessary for your software people to own a COBOL Software Licence for TSX+.

8. The housekeeping routines which to date we have carried out for you such as disc formatting and error checking, will be an integral part of your running your own operation. The utilities for these will be supplied to you.
9. Apex will continue to provide engineering support for your installation, or can arrange third party support if required.
10. We have placed orders on the factory for the equipment and for the latest version of TSX+. We will be in the position where we can deliver your new system and uplift the existing one within a period of 4-5 weeks. Your new system once installed, should be able to handle both your current programs as supplied by your company until these are no longer required, and the future programs to be supplied by your associate company overseas, and therefore, there will not be a requirement for duplication of equipment on your premises.
11. At the time of providing the new system for you, we will require a letter discharging us from any further obligations for the application software associated with your installation.

We believe that our offer to you is an excellent one which will very adequately provide the vehicle for your on-going systems development.

We look forward to discussing it further with you and to meeting your associates from Australia.

Kind regards."

It is to be noted that there was a variation from the reference to a Standard DEC Computer in that a 40 megabyte Winchester Drive was referred to and a Magnetic Tape Cassette Drive that, according to Mr Gibson and as is stated in the letter, being done so as to provide for a configuration similar to that of the original computer. Essentially, as I understood Mr Gibson's evidence, it was necessary to arrange for this particular set-up to make provision for the 40 megabytes of disc space. Mr Gibson's explanation of his letter of 22 September



1983 was that it set forth the basis of settlement and the ancillary matters which had been discussed and at page 10 of the notes of evidence, he stated that so far as he was concerned, the settlement was completed in the telephone conversation he had with Mr Bakker on 1 September 1983 when he, Mr Gibson, confirmed that Apex would supply the computer and accessories as the Plaintiff had proposed at the meeting of 30 August 1983 and that Mr Bakker had agreed to accept them on that basis.

Subsequently there was an enquiry from Mr Bakker as to whether there could be an alteration to the arrangements by cancellation of the new computer. By letter dated 18 October 1983, Mr Gibson informed Mr Bakker that that would not be possible as the computer had already been shipped from the manufacturer. Some time in early November, there was a further conversation in which Mr Gibson was informed that the Plaintiff had decided to instal a Qantel Computer and that certain proposals were put forward by Mr Bakker as to what should then happen in relation to the Apex computers. With regard to the new machine it was Mr Bakker's suggestion that Apex should sell the machine on Goodman's behalf and remit the proceeds to Goodmans or, alternatively, Apex could take over the outright purchase of the old computer at the then residual value or enter into a lease agreement with the finance company to take over the obligation for the old computer. To that proposition Mr Gibson replied by letter dated 11 November, the contents of which are as follows:-

"Further to Thursday's meeting with you, we report as follows:-

1. We acknowledge your decision to proceed with a Qantel computer installation as from 30 November.
2. We are naturally disappointed that you reversed your decision and declined our offer of an 11/23+ on which to instal your Australian software. Especially so, after acting on your instructions, we had brought in a system specifically for that purpose.
3. We have arranged for suppot for your installation to be terminated from 30 November. Kindly pay 2/3 of the maintenance invoice sent to you, which will bring the payments up to date as at 30/11/83.
4. We are not in the position to be able to assist you in the disposal of your 11/23 system."

That letter, from Apex's point of view, effectively closed the door but Mr Bakker replied by letter dated 18 November, the essential parts of which are as follows:-

"We have not, as you put it, declined your offer of an 11/23+. As you must be perfectly well aware, the dispute which existed earlier this year was resolved by an agreement that you would supply a brand new 11/23+ and take away the existing 11/23. Your letter of 22nd September accurately records what had been agreed.

I subsequently suggested a different approach, but you were not prepared to accept my suggestion, indicating that the 11/23+ was already on the way. In those circumstances the original agreement stands and you must, of course, supply us with the 11/23+."

However, Apex did nothing and eventually the Qantel computer was installed and subsequently Apex disposed of the new computer leaving the old computer in the hands of the Plaintiff. Mr Gibson's attitude was that he considered the Plaintiff had "welched" on the whole arrangement.

During the course of cross-examination, Mr Gibson was questioned as to what he intended by paragraph 9 in his letter of 22 September 1983 when he made reference to the fact that Apex would continue to provide engineering support for the installation or alternatively that Apex would arrange third party support if required. Mr Gibson explained that so far as Apex was concerned, by reason of the configuration of the computer, third party engineering support would of necessity have to obtain any necessary parts from Apex and in that way - even although Apex might not do the actual maintenance work itself - it would still have an ongoing relationship in the supply of spare parts. He reiterated that in his view Mr Bakker had said on 30 August 1983 that it was intended to use the new computer with the Letraset software but he acknowledged there was no explicit statement to that effect in the letter of 22 September 1983 although his evidence was given in such a manner that I discerned an underlying belief, at least in Mr Gibson's mind, that the whole discussion was on the basis that the Plaintiff wanted to use the Letraset software and that the new computer under discussion would be the computer in which that software would be used. He declined to accept Mr Judd's suggestion that in reality the true terms of settlement involved a simple exchange of the old computer for the new, with the other discussions being merely ancillary and not forming contractual terms in relation to that settlement.

For the Plaintiff, the first witness called was Mr Lerner who had been called in as a computer consultant to assist

the Plaintiff with the difficulties it had found itself in once the original computer failed to perform. He made it plain that so far as he was concerned - and I gather from his evidence that it was his understanding the management of the Plaintiff company were of the same view as was he - the Plaintiff really wanted no further contact with Apex save that it wished to obtain a Standard DEC machine which would be capable of handling the Plaintiff's requirements. Such a machine would then have been maintained by the Digital company because, according to Mr Lerner, that company would maintain computers which were truly DEC machines but would not maintain them if the computer was partly made up of Digital components and partly of foreign components. Having been informed of the terms of settlement, Mr Lerner took no further part in the discussions but his evidence can be best summed up by stating that he felt it had been made clear to Mr Gibson that there was grave dissatisfaction with the original computer, that a new computer was required in its place and that the relationship between the Plaintiff and Apex would then cease. Mr Lerner had not actually seen Mr Gibson's letter of 22 September 1983 until either the day of the hearing or the day before. He stated quite categorically that if he had been aware of the configuration of the computer which was being offered by Mr Gibson in place of the original computer he would not have recommended acceptance of the proposed new machine. Mr Lerner's view was that having regard to all the trouble that had occurred, the supply of a new computer which would take the Letraset software would have been appropriate compensation. At p.35 of the notes of evidence, he categorically

stated there was no agreement between the two companies that Apex would maintain the hardware of the new machine. To the same effect was the evidence of Mr Waite who was the Commercial Manager of the Plaintiff company. He was adamant that there was no mention made of Apex maintaining the new computer and he went on to state that he had in fact made enquiries of other engineers as to whether or not they would undertake the maintenance of the new computer once installed. His impression was that when the settlement was arrived at, Mr Gibson was relieved because he was well aware of the problems that had been experienced with the original computer, that they were inherent in the system and that Mr Gibson did not know how to rectify them. The principal witness for the Plaintiff however, was Mr Bakker who is the Managing Director of the Plaintiff company. There is no doubt in my mind that early in 1983 Mr Bakker became dissatisfied with the performance of the computer and began looking for a solution to the problems which his company was then facing. The options, as he saw them, were to obtain a new installation and program or alternatively to obtain a new installation; as a further alternative, to obtain a new program. He maintained that he was anxious to arrange a meeting with Mr Gibson so that the problems could be sorted out and one of the options he was looking to was the acquisition of the Letraset system which would have been of benefit to his company as it dealt extensively with Letraset in Australia and there would have been both a commercial and financial advantage in being able to utilise that particular system. However, his initial enquiries indicated that Letraset

wanted A\$20,000 which Mr Bakker considered, having regard to the rates of exchange at that time, to be too great a cost. When eventually the meeting of 30 August 1983 was arranged, he had made no firm decision with regard to the Letraset system because of the cost, but he quite clearly had as a possible option the utilisation of that system and to my mind, it was to the very forefront of his thinking at that time. Eventually the meeting did take place along the lines I have already discussed and when acceptance of the terms of settlement were communicated by Mr Gibson to Mr Bakker on 1 September 1983, Mr Bakker stated that he still had to settle the price with Letraset (which he accordingly did), resulting in his letter of 6 September. He maintained that at no time was there any discussion regarding maintenance being carried out by Apex but he did assert, although Mr Lerner did not refer to it, that Mr Lerner suggested the maintenance would be done by the Digital company to which, according to Mr Bakker, there was no reaction from Mr Gibson. Mr Bakker acknowledged, without demurring in any way at all, that in September 1983 when the telephone discussion took place (and he wrote his letter on 6 September 1983), the intention was to use the Letraset system on the 11/23+ Computer as that would have been the simplest means of accomplishing the desired result and it would have been the least costly system to instal. According to Mr Bakker, the plain terms of the settlement were that Apex would supply the new computer and take back the old one and that there were no other terms at all. During the course of cross-examination, on more than one occasion it was suggested to Mr Bakker that in reality he was looking for a new computer

free of charge. He accepted he was looking for a new computer but challenged the fact that it was free of charge reiterating that it was a replacement for a faulty and useless system. It also became plain from his evidence that it was the computer, and the computer alone, which was being exchanged and that his company would retain the visual display units and printer which had originally been supplied by Apex and that they would be used with the new hardware together with the software from Letraset. When he was questioned as to one of the terms in the letter of 22 September 1983, Mr Bakker stated he would have been quite prepared to have given a letter discharging Apex from any further obligations in relation to the software supplied by them simply because at that time, his company would have been on its own, as he put it, with the new machine.

He went on to say that he was later informed by the Letraset programmer that there were problems in running the Letraset software on the proposed new machine. At that stage he said he approached Mr Gibson with a view to endeavouring to cancel the order for the new machine. He says he did that immediately he knew of the problems and once it had been decided to purchase the Qantel Computer, he once again immediately told Mr Gibson. He pointed out, and quite rightly, that there was no necessity for him to say anything at all and he could have sat back and received the new computer from Apex, delivered up the old one and then made a swap for the Qantel. During the course of his cross-examination, Mr Bakker would not accept that it was a term of the contract of supply that the new computer would be used with the Letraset system, and his evidence was

plainly to the effect that the settlement involved a straight changeover from the old to the new computer. He was cross-examined quite extensively on the use of one particular phrase in one of his solicitor's letters where reference was made to an "effective future relationship". It transpired on an examination of the correspondence that that was an adoption by the Plaintiff of a term used by Mr Gibson in an earlier letter, but it is Mr Bakker's contention that even so, the "future relationship" was the one which would exist between the two companies once the outstanding problems had been resolved. He was of the view that unless these problems were resolved, then a lot of damage may result to Apex if Goodmans remained unhappy with Apex's performance. He admitted that not only did he have regard to the Letraset system but he had approached two other firms in New Zealand for comparative software systems one of those firms being Aldridge Punter Limited and the other being Hays' Computer Systems Ltd. Both those firms had quoted prices in the region of NZ\$10,000. Eventually he was able to obtain the Letraset system at A\$6,000 which, at that time, virtually equated with the NZ\$10,000 quoted in New Zealand. Mr Bakker also refuted any suggestion that there was any question of the maintenance work being done by Apex and he pointed out that if there had been any such arrangement, it would have been referred to in the correspondence and in any event, he would have wanted to know the cost, and the term during which the maintenance contract was to run before he would have agreed to it.



Nowhere in the correspondence is it specifically referred to that it was a term of the settlement that the new computer would in fact be used in conjunction with the Letraset software nor is it spelt out in the correspondence anywhere that it was a term of the settlement that Apex would continue to do the maintenance work on the hardware. I have no doubt that that was a hope which Mr Gibson had and on this particular point there is a conflict in the evidence. Mr Gibson maintains it was mentioned but if that was so, it is somewhat strange that it is not referred to particularly in the letter of 22 September 1983. Mr Cato on behalf of the Defendant relies upon the third sentence in paragraph 10 of that letter as support for the contention that Apex was to continue to do the maintenance work. I do not accept that at all but accept Mr Judd's submission that that sentence is in the nature of a warranty and cannot be elevated to the status to which Mr Cato would like it elevated. I am satisfied from the evidence of Mr Lerner that there was a desire to be quit of any continuing association with Apex and I am of the view, and so find, that during the settlement discussions there was no reference made to the maintenance of the hardware at all. Thus that particular aspect never became a term of the settlement and I am further of the view that it was Mr Gibson's fond hope that eventually his company would be involved in the maintenance of the computer, once installed. But I do not think that this particular aspect of the matter can be regarded in any light other than that. I entirely acquit Mr Gibson of giving misleading evidence as I found him particularly open in the way he did give his

evidence as indeed was the case with the other three witnesses, but with the passage of time and with the concerns with which he was faced at that time, I am of the view that he has placed a connotation on the negotiations which cannot be sustained. Likewise I am of the view that it was never a term of the settlement that the computer would in fact be used in conjunction with the Letraset system. It is my view that the original intention was to so use the new computer but that that situation became overtaken by events. If that had been a term of the settlement, it is strange that such a term did not appear in the letter of 22 September 1983. It is somewhat of a pity that these parties who in the initial stages had the assistance of reputable solicitors did not resort to legal advice once the settlement was arrived at to ensure that it was recorded correctly in writing. However, they did not do so probably to the disadvantage to both parties. To my mind the settlement which was arrived at was one which called for the supply of a new computer (as is referred to in Mr Gibson's letter of 22 September 1983) and the return to Apex of the old computer. Mr Bakker, notwithstanding that the reference in the letter of 22 September 1983 is not to a Standard 11/23+ Computer, conceded that he had in fact to accept the computer which is referred to in that letter particularly when he acknowledged in his letter of 18 November 1983 that the letter of 22 September accurately recorded that which had been agreed.

Accordingly, I find that there was an accord which ought to have been followed by satisfaction to the Plaintiff by the

delivery up of the new computer in return for the surrender of the old computer to Apex. That did not happen but to my mind the parties are still bound by those terms and they ought not now to be able to resile from those terms otherwise it would be too easy for parties to arrive at settlements and simply, for reasons of their own, walk away from them if they consider it advantageous so to do. This is not a case where the Defendants are entitled to say that they are discharged from any liability under the settlement by reason of the conduct of the Paintiff. The appropriate course now in my view is to simply adjourn the proceedings for further consideration once the parties have had an opportunity to consider this judgment but I note that the evidence disclosed that the landed cost into New Zealand to Apex of the new computer in question was \$25,000 with the old computer being sold for \$11,400.

At this stage I formally adjourn the proceedings to a date to be fixed.

P. D. L. J.

Solicitors:

Cairns Slane Fitzgerald & Phillips, Auckland, for Plaintiff;  
Johnston Prichard Fee & Partners, Auckland, for Defendants.

v22R

IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

A.1221/84

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Plaintiff

A N D APEX COMPUTER SYSTEMS

First Defendant

A N D STEPHEN ROB GIBSON and  
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