IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

Set 2

A. No 359/85

BETWEEN ESPRIT MARKETING LTD

Plaintiff



A N D DEALERS GUIDE LTD

Defendant

Date: 4 March 1987

Counsel: Mr Jefferson for Plaintiff
Mr Dugdale for Defendant

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J. Date 4. 3.87

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**MINUTE OF SMELLIE J ON R 438 CONFERENCE**

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Paul R

Mr Jefferson requested the Conference at callover in the face of Mr Dugdale's opposition.

The case concerns a claim by the Plaintiff for lost commission income which it says it would have earned had the Defendant not wrongly terminated a sole agency agreement.

Mr Jefferson's assessment of the case is that it concerns two features. First whether there was a breach. Secondly, if there was, what notice should have been given and the quantum of expectation damages over the appropriate period of notice as fixed by the Court.

Mr Jefferson indicated that he has retained an accountant who has prepared a report in which are calculated expectation damages for three periods, namely one year, three years and five years respectively. He indicated that he would adduce evidence in respect of all three periods but of course his Amended Statement of Claim advances the maximum figures.

Mr Jefferson indicated that he was prepared to either exchange reports with the Defendant or alternatively to make his expert's evidence available by way of a prepared brief on the basis that if Mr Dugdale proposed to call an expert in response the evidence in chief of that expert would be available prior to trial. Mr Jefferson, responding to my inquiry, indicated that Mr Dugdale's brief would have to be available to him a fortnight before trial for the exchange procedure to be worthwhile.

Mr Dugdale opposes this proposition. He acknowledges that he has retained an expert but says he has not yet received a report. He contents, however, that the pleadings have indicated pretty clearly how the damages have been calculated. Mr Dugdale further submits that the report he receives from his expert may will arm him with questions for cross-examination which will enable him to either demolish completely or expose gaps in Mr Jefferson's expert's calculations. Mr Dugdale contends that in the orthodox adversary situation he is entitled to keep that information to himself and that it would not be just to require him to disclose it. Mr Dugdale's general approach to the case is that there are two issues. First, is there an implied term (as pleaded), and if not what notice was required and what damages should be paid in lieu of notice.

Mr Jefferson further indicated that if he could not have an exchange of reports or be entitled to the evidence in chief of any expert witness Mr Dugdale would call in opposition then there was no advantage to him in disclosing his hand in advance and he preferred not to do so.

I indicated to both Counsel that it would be of advantage to the Court to have this expert evidence prepared in advance, observing as every Judicial Officer and Counsel of experience knows, that complex accounting calculations cannot be transcribed viva voce into the notes of evidence in any satisfactory manner. Mr Dugdale's response to that, however, was that there are occasions when the interests of justice are more important than the convenience of the Court. I put it to him that his desire to hold in rèserve his points for cross-examination or opposing evidence could result in the damages not being proved satisfactorily resulting in the Plaintiff recovering lesser damages because of Mr Dugdale's superior advocacy rather than as a result of justice being done. Mr Dugdale's response was that he saw no difference between justice being done and a party being allowed to conduct his case through his advocate with as much skill as the rules allow. In his usual frank and robust manner Mr Dugdale indicated clearly enough that he made no apology for holding that point of view.

Contrary to my usual practice I did not reach a conclusion during the Conference and dictate the Minute with Counsel present. I indicated I would take time to reflect.

One can respect and indeed sympathise with Mr Dugdale's approach to the matter. In my view, however, the philosophy of the new High Court Rules is to move away from such a technical approach to the disposal of civil litigation. The rules now favour the Court requiring Counsel to join in the search for the truth in order that justice may be done. Thus R 438(3) provides:-

> "On the hearing of the application, the Court may make such orders and give such directions (whether sought by the party applying or not) as appear best adapted to secure the just expeditious, and economical disposal of the proceedings."

In this instance the advantage to the Court of having the detailed accounting evidence in chief in the form of a prepared typed statements would be considerable. Mr Dugdale denies that it would be any advantage to him but it certainly could not be a disadvantage. He will not be taken by surprise and conversely if I require him to provide to Mr Jefferson seven days before trial a prepared statement of any evidence in chief that he proposes to adduce from an opposing expert the whole issue of damages is likely to be traversed more effectively and thoroughly in cross-examination than would otherwise be the case. Those advantages (which will assist to secure a just disposal of the proceedings) in my view outweigh what I see to be a relatively minimal disadvantage (I would not categorise it as a prejudice) to Mr Dugdale's client if he is obliged to disclose in advance where positively he disagrees with the detailed exposition of Mr Jefferson's accountant.

I therefore direct that one month before trial Mr Jefferson is to supply Mr Dugdale with the brief of his accounting expert's evidence in chief. And further that if Mr Dugdale proposes to call an accountancy expert in opposition then he must provide to Mr Jefferson seven days before trial a brief of the evidence in chief of that witness. It will be appreciated that this direction does not require the Defendant to disclose any report or advice it receives. It is only if an opposing expert is to be called that disclosure is required.

Counsel indicated to me that there will be some documents which they will agree upon and have bound up in an indexed and paginated volume for the hearing. I direct that that is to be done and that the cost be shared initially by the parties at this juncture - subject to the Trial Judge's ultimate decision on costs.. The originals should be bound in one volume for use in the witness box and production as an exhibit. Copies will then be required for the Bench and Counsel.

I fix the costs of this Conference at $150 but leave the question of whether or not costs should be awarded and to which party to the Judge who conducts the trial.

Robert Smellie J.