IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

824

CP 23/88

BETWEEN JARDEN & CO LIMITED

Plaintiff

AND IAN ROGER BOOTH and MAREE ANNETTE BOOTH

Defendants

Hearing & Judgment 7 July 1989

Counsel Ms A.C. Simpson for Plaintiff
Mr J.P. Geoghegan for Defendant

ORAL JUDGMENT OF ANDERSON J.

In this proceeding the plaintiff, which is a company carrying on the business of a sharebroker, sues the defendants for judgment in the sum of $12,083.98. In the course of the evidence insufficient has been disclosed against the second named defendant, Maree Annette Booth, to justify consideration of the plaintiff's claim against her. That is a consequence of the evidence as it has developed, a point I mention because in principle there would be no particular impediment to liability being found on an agency principle basis in certain circumstances. Nevertheless, in this case, as the matter has developed, one need not consider the position in relation to Mrs Booth and she is struck out of the proceeding.

The plaintiff's claim against Mr Booth is

founded on an arrangement alleged by the plaintiff to have been entered into on 18 september 1987 whereby the plaintiff, in its capacity as a sharebroker, would purchase parcels of shares to the approximate value of $20,000 on behalf of Mr Booth. The cause of action is pleaded generally and imports considerations of contract. The exact jurisprudential basis of the claim really lies, I would think, in the agent's right to indemnity for monies expended on behalf of a principal with an ancillary contractual right to payment by way of consideration for the agency services. The pleadings are sufficiently broad to encompass that particular jurisprudential basis and no point has been taken on behalf of Mr Booth to the nature of the pleadings which in any event could have been and would have been amended to enable the parties to focus, as in fact they have, on the central issue which is factual.

That issue is whether, in fact, on 18 December 1987 Mr Booth acted in such a way that in law he must be taken to have authorised the plaintiff to purchase shares in the manner that they were. That factual issue falls to be determined like any other factual issue on an evaluation of the reliability of witnesses and on circumstantial evidence which fairly and properly points in a particular direction.

I have used the term reliability rather than credibility, as I mentioned to counsel in the course of

submissions, because it is neither necessary nor desirable in this case that findings should be made which import moral judgments. All of those who work in the Courts well know that persons can give evidence honestly but mistakenly particularly when there has been some passing of time between events as ephemeral as the spoken word and the trial itself.

In this case we are concerned with a telephone conversation, the exact words and phrases of which can never be retrieved and only the effect of which ascertained, on the civil standard of proof, namely probabilities, can be considered. This civil standard requires the Court to determine whether one recollection, one result, is or is not more probable than the other.

The principal evidence for the parties was given on the one hand by Mr Martin Ivor Harriman, the Managing Director of the Auckland branch of the plaintiff, and on the other hand by Mr Booth. Mr Harriman is a sharebroker of great experience. In 1987 he had been practising his profession for some 27 years. He has been Chairman of the Auckland Stock Exchange, President of the New Zealand Stock Exchange, a former member of the Securities Commission, and is presently a member of a Ministerial Committee of Enquiry into share market dealings of national relevance. I mention these matters for one reason only. That is to

indicate that he is a man very experienced in his profession with a proven record of reliability.

Mr Booth is a somewhat younger man. In September 1987 he had conducted his own small engineering business with the assistance of his wife who managed his accounts and no doubt supported him generally in the way that younger people will pull together for the benefit of themselves and their family. It is not clear on the evidence how long he had been in business but he was able in August 1987 to sell his business and this transaction produced disposable capital of approximately $20,000. He is presently employed as a salesman. In what commercial area is not known.

Mrs Booth, as I have mentioned, attended to the accounting and administration of the small business and both she and her husband could not have been nor did they pretend to be unfamiliar with the usual paper incidents of business operations; remittance advices, invoices and the like.

On 18 September 1987, Mr Booth was making enquiries concerned the sensible investment of the $20,000 capital. He made enquiries in consequence of a unsolicited approach from what seems to have been a futures dealer called Caragreen. By way of contacts and references through friends, he got in touch with a Mr M.D. Armstrong,

an Auckland Chartered Accountant, whose evidence was to the effect that Mr Booth showed an interest in investing in the stock market wherefore he directed him towards Mr Harriman and, of course, the plaintiff company.

September 1987 was a month of heady days and the delirium of share trading before the stumble of which we are now all aware. Perhaps a hundred orders per day were placed by Mr Harriman, who was working long hours meeting his clients' needs. Mr Booth contacted Mr Harriman, who discussed with him matters generally relating to the share market, notwithstanding the pressure of work he was subject to at the time, and did so, I do not doubt, because he impressed me as a courteous man and because Mr Booth had communicated with him by way of an old friend and professional colleague, Mr Armstrong.

Advice was given that an appropriate investment would be a combination of leading companies in different commercial areas with a monetary spread of reasonable equality across the four companies by the $20,000 available. It is common ground that Mr Booth asked for and expected to receive some information. Where the parties differ is that Mr Harriman says that he was left with the clear impression from the whole of the conversation that Mr Booth instructed him to purchase shares along the lines that had been discussed. Mr Booth says he did not, nor intended, any such thing; that in effect, although these are

my words not his, he considered it a useful short period of tuition in the mysteries of the stock market, and expected further reading materials as it were to advance his learning. What he received very promptly was a series of documents called buy contract notes, issued by the plaintiff company. These are exhibited to Mr Booth's affidavit sworn and filed in opposition to an application for summary judgment. It is appropriate for me at this stage to describe the impression conveyed by these documents. On the top left hand corner in letters ranging from half inch lower case to almost one inch upper case is the name of the plaintiff company. In the top right hand corner in bold and brilliant blue ink appear the words "Buy Contract Note". In the bottom portion of the document similarly in bold blue print are the words "Remittance Advice". The body of the document discloses in what is plainly computer print the names of Mr and Mrs Booth, their address, the particulars of a client number, particulars of date of purchase, a description of the shares, prices, brokerage, stamp duty, and the words in the remittance advice after noting the account balance:

> "Settlement of your account is due on receipt of this contract note. Please forward your cheque by return."

Part of the printed form information contains the words:

> "Ownership of the above shares has now passed to you."

Beneath that, "Balance of Order". In the remittance advice the words "Account balance", "Client number", "The Shares covered by this contract will be registered as shown below unless otherwise instructed within 24 hours. Please contact your usual adviser."

These contract notes cover the purchase of shares in four companies: Wattie Industries Limited, Chase Corporation Limited, Fletcher Challenge Limited, and Brierly Investments Limited. They are annexed to Mr Booth's affidavit in the form in which they were obviously sent, namely a continuous folded sheet approximately a metre long overall. This document when opened out discloses in file, as it were, the references to Buy Contract Note and Remittance Advice in bold blue print. Nothing more reminiscent of a commercial document importing obligations of payment or other contractual obligations could be imagined particularly in the eyes of persons who have had some business experience.

Mr Booth did not react to those documents. On 3 November 1987 he communicated with Mr Harriman to suggest for the first time that there was no contract in relation to shares, that he had ordered no shares. He was stimulated to make that call, according to the evidence on his behalf, because he had recently received formal looking share certificates from two of the public companies mentioned.

Irrespective of the issue whether an arrangement such as that contended by the plaintiff was or was not entered into, there was some incentive to a purchase of unpaid shares in the share market to quit liability therefor after the sharemarket collapse on 19 October. I mention that in order to dispose of it as an issue in this case. My judgment does not lie on findings of bad faith or knowingly unwarranted attempts to evade liability. The sharemarket crash is simply an incident that would make more keen the desire to avoid liability whether one were entitled to or not. It is an incident capable of equivocal inferences and it would be unjust to take an inference unfairly.

I return to the events about the time of 18 September. Counsel for Mr Booth has urged that I do not have regard to Mr Booth's failure to respond as early as one would expect to the receipt of the buy contract note, it being counsel's submission that as a matter of law the Court cannot have regard to post-contractual conduct for the purpose of ascertaining whether a contract existed. Reliance is placed on a number of authorities which support the principle that, in England at least, one may not be able to have recourse to post-contractual conduct as an aid to interpreting the terms of the contract. That is the underlying reasoning of L. Schuler AG v Wickman Machine Tool Sales Limited [1974] AC 235.

I find, however, that if there is a contract or arrangement in this case its terms are fixed. The difference between the parties lies not in the scope of the contract but in the fact or otherwise of its existence. If it exists, it exists in terms of the plaintiff's claim and the buy contract notes and this has been very readily and appropriately conceded on behalf of Mr Booth by his counsel.

The issue then is one of fact. One must always be entitled to have regard to all relevant circumstances in determining a factual issue. It is commonly the case that a Court tests the issue whether a fact is established by reference to the conduct of the parties before and after the appropriate time because conduct is a guide to knowledge, and here the plaintiffs says after the conversation in which Mr Harriman clearly formed the view that he had been instructed to purchase in terms of the buy contract notes, generally speaking, documents were sent to Mr Booth which in effect proclaim as if banners the very thing that Mr Harriman says occurred and Mr Booth's response is not to dispute at that stage. He remained silent. The plaintiff says, and is entitled to say, how could a person with experience in business receiving such documents think that they were something quite different from what they are manifestly on their face. Because nothing was done, says the plaintiff, it is a proper inference that what they state on their face was sufficiently consistent with what Mr Booth

understood to be the position that he did not need, nor was motivated, to ring Mr Harriman and say in effect "what is this then. Why are you sending me bills when all we had was a friendly chat about the way the stock market works?" The inference able to be drawn from Mr Booth's inactivity in the absence of an explanation indicating the greater likelihood of an alternative view is that the telephone conversation and the buy contract note were consistent events.

The alternative explanation tendered is that Mr Booth, expecting apparently something in the nature of pamphlets or other promotional material, received this wad of commercial looking documents, couldn't really make them out, filed them with junk mail, as it were, next to the telephone. Mrs Booth had seen them and come to the same view; that is they were undeserving of any other treatment. She was ill at the time and it may well be that she was not sufficiently fit to turn her mind to the nature of the documents. The same can scarcely apply to her husband. I cannot accept, with all due respect to Mr Booth, that a person who had been in business, who had been thinking for weeks about how to invest money, who had been consulting friends and professional people, could receive this folio of buy contract notes which one would need only to glimpse at for seconds to realise were conveying the idea of liability, to see that they were.

Further inferences are relied upon by the

plaintiff. These may be summarised as follows. When Mr Harriman first began speaking to Mr Booth, the conversation was general in terms of stock market activities or investments. It then moved to the stage where Mr Harriman gave advice as to how $20,000 could properly be invested, namely in four leading companies with an equal capital distribution. That at the time he was discussing these matters he was taking details from Mr Booth, not on some office jotter pad, but on a pad specifically laid out for the purposes of taking instructions from a potential buyer. And on this pad he noticed the full names and address of Mr and Mrs Booth. He noted down four possible companies; Brierly, Chase, Fletcher and Watties, and either in the course of this telephone conversation or immediately afterwards he noted quantities for these various companies of 1000. 1000, 600 and 700 respectively, which would cost with brokerage charges approximately the amount of the investment monies available and which inter se, amounted to a more or less equal distribution of the capital notwithstanding the different numbers of shares amongst the various companies.

Then Mr Harriman noted that this was a new client and sent in the normal ourse of his office's administration this buy order, as it were, to the computer operator for collating the information for office purposes and for purchasing purposes on the floor of the exchange.

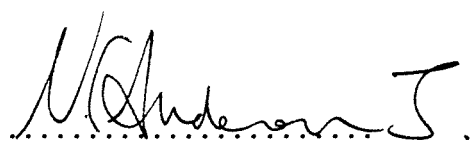
Wherefor purchases were made and buy contract notes issued.

What the plaintiff says, by counsel, is looking at the matter in terms of probabilities, is it more probable or less probable that a man of nearly 30 years experience at the top of his profession should have been so fundamentally mistaken as to a dealing with a client by telephone which was his daily task that he would think without cause that a casual and friendly enquiry for information about the stock exchange amounted to an order to buy $20,000 worth of shares spread over four companies with a more or less equal distribution of capital. That is how it is put in effect by the plaintiff and I find that it is more probable than otherwise that whatever was said between Mr Harriman and Mr Booth, any objective bystander witnessing the situation would come to the view that Mr Harriman had received instructions in the terms he deposed to. It may not have been Mr Booth's subjective intention to convey what was conveyed. In accordance with orthodox law, conveniently expatiated in the following terms in Meates v Attorney General [1983] NZLR 308, the acid test in a case like the present is whether viewed as a whole and objectively from the point of view of reasonable persons on both sides the dealings show a concluded bargain. I find that viewed as a whole and objectively from the point of view of reasonable persons on both sides, it is more probable than otherwise that Mr Harriman received instructions in the terms he

deposed to.

For all of these reasons there must be judgment for the plaintiff. The shares in question have recently been sold and therefore the amount recoverable by the plaintiff has been reduced to $12,083.98. and there will be judgment for the plaintiff accordingly.

As a matter of discretion I allow interest but limit it to a period of 12 months down to today's date. I make no order for costs on the application for summary judgment because the issues between the parties were such that a Court really had to decide on the basis of reliability. On the judgment today the plaintiff as in the normal course is entitled to costs on scale and disbursements as fixed by the Registrar. I am obliged to counsel for the helpful way in which the submissions and case were presented.



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