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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP.2186/87

1210

LOW PRIORITY

BETWEEN JORDAN SANDMAN SMYTHE LTD
Plaintiff

A N D JOHN ADAM ALLEN-ANDREWS
Defendant

Hearing: 11 September 1989

Counsel: Sandelin for Plaintiff
Malloy for Defendant

Judgment: 11 September 1989

(ORAL) JUDGMENT OF SINCLAIR, J.

This particular claim arises out of allegations made by the Plaintiff that the Defendant, in 1987, purchased two lots of shares totalling 6,000 in the Brierley consortium on two separate occasions, namely 21 October and 22 October 1987. The Defendant, for his part, denies that he ordered those shares. The question then comes down to whether or not the Plaintiff has discharged the onus of proof upon it, which essentially involves a question of credibility. The amount involved, after a resale of the shares in question plus some shares acquired as a result of a bonus issue and receipt of some dividends, is $13,336.95. It is interesting to note that there is no real argument between the parties as to the legal principles and indeed this is an area where there can be little room for argument, the essential statement of the

law being set forth in Hallsburys Laws of England 4th Edn, para.45, where it is said:-

> "A broker who has properly carried out his instructions is entitled to a full indemnity from his client against any loss or liability incurred by him by reason of his having entered into the contract on his client's behalf."

That statement of law was applied in this country many years ago in Sligo & Anor. v. Oswin (1904) 23 NZLR 337 where at p.341 Williams, J. said:-

> "It is indisputable that if a broker is employed to buy shares he is authorised to carry out the contract by paying the price, and that he can recover from his principal the money so paid."

It is also interesting to note the relationship between the parties in this action. The Defendant himself gave evidence that in 1987 he had become somewhat interested in the sharemarket by reason of the fact that the person with whom he was then living had, at that time, been offered shares in her employer company. He gave her certain advice as to what he thought she should do in relation to that proposed purchase. He then went on to say that he looked up a list of sharebrokers in the Yellow Pages and had rung at least two who had both asked that he attend at their offices for the purpose of being interview so that his personal particulars could be obtained. He declined to attend because, as he stated in evidence, he had already been a bankrupt. According to an affidavit he

filed in these proceedings he had been discharged in 1986 and did not wish to disclose this fact as he would not have received any credit. The Defendant was wide awake enough to realise that if he purchased shares through a sharebroker he would in fact be obtaining credit. As a result of further telephone calls he eventually got in touch with the Plaintiff company and had a discussion with one of the operators employed by the Plaintiff but just who that was is not clear from the evidence. What is clear, however, is that on 21 May 1987 the Defendant purchased through the Plaintiff 1,000 Brierley shares at a total price of $3540. The contract note was sent out to him and on the bottom was the statement; "Payment is due on receipt of this contract. Registration will not be effected until payment is received". As events transpired, the Defendant did not pay for those shares but directed that they be sold. A contract note was sent out to him on 24 June 1987 showing a credit from that sale of $3711.83. So that without any payment from the Defendant there was a profit of $171.83 which the Defendant acknowledges he received. The probabilities are, on the totality of the evidence, that he received that cheque at or about the time the sale note in respect of the 1,000 shares was effected. At that particular time the Defendant was given an account No. 110949. Despite what was on the Plaintiff's contract notes, their strict terms were not followed in that as I have already pointed out, the Defendant was not required to pay for that first lot

of shares.

The evidence then goes on to disclose that on 21 October 1987, not long after Mr Wells had joined the Plaintiff company, he received a telephone call from a person who gave his name and who, according to Mr Wells, identified himself with the account No.110949 - the very same account number allotted to the Defendant in the original transaction for 1,000 Brierley shares. Mr Wells then made the necessary entries into the computer and came up with the answer that indeed they did have a client under the Defendant's name at the address then given (Great North Road, Grey Lynn). Mr Wells says he took from him an order to purchase 3,000 Brierley shares. There was a discussion concerning the price, originally set at $4 but finally the instruction noted the it was not to exceed $3.95. The name of the Defendant appears on the record of the buying order as does the number of the account. In due course there was a purchase of those shares on that particular day. According to Mr Wells, in furtherance of the Plaintiff's normal practice, a contract note was sent out on that same day indicating 3,000 shares had been paid at a price of $3.90 totalling $11,953.30.

On the following day, Miss Shiak, another operator employed by the Plaintiff company, deposed to the fact that she received a telephone call from a person stating himself to be the Defendant. Once again there was an

order for 3,000 Brierley shares. There was a discussion as to $4.20 being the maximum price at which the shares could be obtained. At the time she received the call from the person who was, she believed, the Defendant, a name was given. She confirmed by use of the computer that he was in fact a client of the Plaintiff company and that the name and address given coincided with that which was then on the Plaintiff's records. Once again a record of the purchase was sent out to the Defendant's address.

Nothing further was heard although at that time the sharemarket was volatile and there was a perception that there would be a crash of the magnitude experienced in the United States in the 1920s. There matters remained until, according to Miss Shiak, 5 November 1987, when she received a telephone call from the Defendant. The Defendant of course disputes that there was a telephone call on that day. After giving his name and after having clarified his attitude towards the share purchase (which Miss Shiak says she made on the Defendant's behalf), the Defendant claimed he had received what he termed "junk mail" from the Plaintiff; that he did not know what it related to and claimed that he did not even know of the existence of the Plaintiff company, nor had he requested a purchase of the shares in question. On the following day, as a result of messages left by Mr Wells, the Defendant contacted him. There is no doubt that that conversation was somwhat heated and at that

particular time once again, when queried as to the purchase of the shares and why his account was not settled, the Defendant replied that he had never placed the order. Mr Wells went on to say that he was not satisfied with the explanation and asked the Defendant why he took so long to respond as the contract notes had been issued on the day of purchase of the shares. The Defendant replied that the letters had been thrown away because he regarded them as "junk mail".

By and large, that is still the Defendant's stand today. He says he did not order the shares and while he acknowledges that he has received contract notes, he says he took little notice of them putting them to one side as he regarded them, as he still says today, as "junk mail". That is the evidence of a man who, according to his own evidence, at or about this time, was engaged in doing building work and acting under legal advice from his solicitors in relation to a property on which he was working in the New Lynn area. One can infer from his evidence that he was a person who was somewhat used to business methods in ordering and paying for materials. Here he is, faced with at least two letters, one probably containing 2 confirmations of purchases of shares totalling 6,000 in number and involving over $20,000. If he regarded it as "junk mail", one wonders why he did not return it to the Plaintiff or immediately get in touch with the Plaintiff and complain bitterly that he was being

sent documents in relation to share purchases which had never been ordered by him. He is not an unintelligent man and one can gauge from his behaviour in the witness box that he has had a reasonable education. But each of these documents has plainly got on them "We have bought for you Brierley Investment Ltd 50c. ordinary shares 3000" and then there is the figure. That is in regard to the first purchase on 21 October 1987. The purchase on 22 October 1987 was made in two lots, one for 2,000 shares and the other for 1,000. Any reasonable person receiving that mail would know just by a mere perusal of the documents that he was being billed for over $28,000 worth of shares which the Plaintiff company maintains it had purchased on behalf of the Defendant - and yet he does nothing about it until such time as he becomes aware of a telephone message. He then gets in touch with the firm and denies he has placed such an order. When asked whether he could suggest anybody who might have used his name to perpetrate such a transaction he indicated there was such a person but that the law of libel prevented him from disclosing his name and yet here, if he is right, there was a fraud being perpetrated in his name and he did nothing about it either by going to the Police or taking some overt action which would have brought the matter forcibly to the attention of the Police. There can be no suggestion in my view that either Mr Wells or Miss Shiak are in any way involved in any fraud - indeed it was not even suggested during their cross-examination - but one would have to ask

what they had to gain from such a transaction and what had their employer to gain other than commission on the purchase and sale of the shares - if eventually sold. Therefore, there has to be a resolution as to who ordered these shares. Was it the Defendant? Has it been established by the Plaintiff, on a balance of probabilities, that it was indeed this Defendant who ordered them? It is undeniable that he received copies of the purchase documents. It is also undeniable that he did nothing whatever immediately following receipt of those documents until a request for payment was made. Today in evidence he says he spoke to the Plaintiff's employees only once in November 1987, namely to Mr Wells who then put him on to Miss Shiak and then on to the Manager. It is rather interesting that that sequence of events was not put to Mr Wells. One would have thought that if Mr Wells was to be challenged on that point, and if Miss Shiak was to be challenged as to her recollection as to when the conversation took place, that would have been a matter which plainly ought to have been put to Mr Wells - and it was not. I am of the opinion - and I find as a fact - that on 5 November the Defendant did have a discussion with Miss Shiak and that on that occasion - as he acknowledged - the probabilities are that he told her he did not know of the Plaintiff firm, he saying that he could not even remember its name. That I find, in all the circumstances, not credible. Here is a man who alleges he had only one dealing with a sharebroking firm in May and

June, some four months prior to this particular episode, a firm which has a somewhat unusual name - and yet he now says he does not recall it. This has all the hallmarks of someone who has sized up the situation and has decided that there is a risk to be run but that there might be some dollars in it at the end. He had already done it with the first purchase of shares without paying for them in accordance with the ordinary business requirements, and made a small but quick profit. The probabilities are that he foresaw a possibility of doing that yet again but he got caught. Once he realised that the sharemarket was tumbling the way it was his only refuge was to suggest that he never ordered the shares. With the checks and balances made by Mr Wells and Miss Shiak, I am satisfied the Plaintiff has established, on a balance of probabilities, that it was this Defendant who ordered the shares in question, and that the Plaintiff, having bought them, was then entitled to look to the Defendant for reimbursement. It is not credible in the circumstances of this case to suggest that someone other than the Defendant placed the orders. One wonders, accepting Mr Wells evidence as I do, how anybody else could have got hold of the Defendant's account number if it was not the Defendant himself who was on the telephone. I therefore reject the Defendant's evidence and accept unhesitatingly the evidence of both Mr Wells and Miss Shiak and I find that the Plaintiff is entitled to succeed. There will therefore be judgment for the Plaintiff in the sum of

$13,336.95 with interest thereon at the rate specified in the Judicature Act 1908 from 22 October 1987 down to the present time. The Plaintiff is entitled to costs according to scale and I allow the sum of $300 for discovery and inspection. The Plaintiff is entitled to disbursements.

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Solicitors:

Rudd Watts & Stone, Auckland, for Plaintiff;

Davies Orr & Co, New Lynn, for Defendant.