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NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP. 549/87

653

BETWEEN: JORDAN SANDMAN SMYTHE AND COMPANY LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as Sharebrokers

Plaintiff

A N D: MICHAEL VICTOR ROBERT STEADMAN of Auckland, Student

Defendant

LOW PRIORITY

Hearing: 5 July 1989

Oral Judgment: 5 July 1989

Counsel: A R Hosking and A M Howlett for plaintiff
J Malcolm for defendant

[ORAL] JUDGMENT OF HENRY, J.

This is a claim for $16,443.77 arising from an order placed by the Defendant with the Plaintiff's sharebroking firm, through its officer Mr Price, for the purchase of some 10,000 shares in Kupe Investments Limited. It is not in dispute that such an order was placed on 24 November 1986 by the Defendant with Mr Price, and that it was for the 10,000 Kupe shares. The evidence establishes that the order was fulfilled the following day, 25 November 1986, at the then ruling price of $2.28 per share. Accordingly the total which became due under the contract, including brokerage and stamp duty, totalled $23,283.20.

Settlement of the account did not follow, and consequently at a later date namely 27 May 1987, which was after the takeover of the company and a resulting conversion of shares, the Plaintiff company resold what was then a total of 6,667 shares in Kupe Group Limited at $1.04 per share, the end result being a net deficiency forming the basis of the claim of $16,443.77.

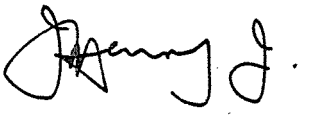
The defence to the issue of liability is confined to an allegation that there was a condition attached to the contractual arrangement between Plaintiff and Defendant to the effect that no share purchase would be made until after payment was made by the Defendant to the Plaintiff of a sum of $10,000.00. There is a direct conflict of evidence as between Mr Price and Mr Steadman in this respect. I have no hesitation in accepting Mr Price's evidence in preference to that of the Defendant. I note in passing, in making that finding, that there are differences between the evidence he has given today and that contained in his affidavit in opposition to the application for summary judgment. I am quite satisfied that at no time during the course of the discussion between these two persons did Mr Price ever state, as a condition of his firm embarking upon the purchase, that the sum of $10,000.00 first had to be paid. It is quite clear that the Plaintiff proceeded to action the buy order immediately that could be done,

the day following the giving of the initial instructions. There is nothing in Mr Price's notation of his instructions to indicate the condition or any indication of its existence as claimed by Mr Steadman. Quite apart from that, even if it could be said that there was such a condition, which as I have said I hold is not established on the evidence, clearly it was one which would have been imposed for the exclusive benefit of the Plaintiff company and not in any way for the benefit of the Defendant, and accordingly can be waived by the Plaintiff. If that were necessary to be considered that waiver is evidenced by the fulfilment of the order on 25 November. I therefore find that there were instructions given by Mr Steadman for the purchase of 10,000 shares, that that instruction was unconditional, and it was accepted and acted upon by the Plaintiff company.

The only remaining matter is an allegation that the Plaintiff company has failed to mitigate its loss, namely that it did not take all reasonable steps to re-sell the shares at the earliest available date, and thereby reduce the shortfall. Whether or not in circumstances such as these there is any duty on a sharebroker to re-sell in the event of a default by a purchaser - and there is authority which indicates no such obligation does arise - I am quite satisfied in the

circumstances here on the evidence that the Plaintiff company did take all reasonable steps to effect a re-sale and to keep the resulting loss to a minimum. Mr Edwards has given evidence as to the practice of the Plaintiff and as to its actions in this particular transaction. The delay between say February 1987, which as I view it is the earliest possible date on which the Plaintiff could in the circumstances have considered re-sale, and the actual date of sale in May 1987 is clearly explained by reason of the effect of the takeover of Kupe and the need on the part of the Plaintiff to have scrip available at the time it contracted to onsell. It is pertinent to observe that no evidence contrary to that given by Mr Edwards has been adduced. I am therefore satisfied that there is nothing in this particular allegation.

Accordingly, the Plaintiff is entitled to judgment in the sum of $16,443.77 together with interest at the statutory rate on that amount, which in the circumstances should apply from the date of institution of the proceedings, namely 30 April 1987. Plaintiff is entitled to costs which will be according to scale, together with disbursements and witnesses expenses to be fixed by the Registrar.



5 July 1989

Solicitors:
Rudd Watts & Stone, Auckland, for plaintiff
Howard-Smith & Co., Auckland, for defendant