1119

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

C.P. No.1550/88

NOT RECOMMENDED

1143

BETWEEN JORDAN SANDMAN SMYTHE LIMITED a duly incorporated company having its registered office at Auckland, Sharebroker

Plaintiff

A N D VIKTOR STRAZNIK of Auckland, Retired Person

Defendant

Hearing: 4 September 1989

Counsel: W.G. Manning & G. Finnigan for Plaintiff
H.T. Knight & Ms L. Diamond for Defendant

Judgment: 4 September 1989

ORAL JUDGMENT OF TIPPING, J.

This is a claim by a firm of sharebrokers Jordan Sandman Smythe Ltd against the Defendant Viktor Straznik. It relates to an allegation that the Defendant ordered various parcels of shares shortly after the sharemarket crash which of course occurred on 20 October 1987. In its statement of claim the Plaintiff alleges that between 30 October and 4 November 1987 the Defendant Straznik orally instructed the Plaintiff to purchase certain shares. It is then contended that the shares ordered were purchased by the Plaintiff for the Defendant. The shares in question are said to be 5,000

Equiticorp Holdings Ltd, 5,000 Robert Jones Investments Ltd and 5,000 Brierley Investments Ltd. Putting the matter shortly the Plaintiff contends that the Defendant has not paid for the shares and has no good reason for his failure to pay.

In May 1988 following the Defendant's failure to pay the Plaintiff sold the shares to best advantage on the market and realised in total the sum of $15,568.51. The shares as ordered, according to the Plaintiff's case, cost a total of $32,198.15. The Plaintiff gives credit for the amount recovered on the sale of the shares plus certain dividends received in the meantime amounting to $831.83. The total claim is accordingly the cost of the shares less the dividends received and the amount received on sale. This is the sum of $15,791.81. That is the amount for which the Plaintiff claims judgment together with interest in terms of the Judicature Act and costs.

In his statement of defence filed by the solicitors then acting for him the Defendant in effect entered a bare denial to the Plaintiff's allegations. His statement of defence was coupled with a counterclaim relating to an earlier transaction which took place in August 1986 and January 1987 whereby he had through the Plaintiff purchased a total of 25,000 shares in the capital of Winstone Ltd which company was subsequently taken over by Brierleys. In his counterclaim the Defendant alleged certain defaults against the Plaintiff in respect of the Winstones transaction. The counterclaim was discontinued

shortly before trial and thus those matters do not require specific resolution by me but they have formed quite a substantial part of the evidence because the Defendant Mr Straznik has harboured throughout a feeling of grievance in relation to what occurred with the Winstone transaction. I do not propose to go into that matter in detail now but I record that I have carefully considered the background which has been disclosed in the evidence.

There were difficulties in registering into the Defendant's name all the Winstone shares in a prompt manner. The volume of business going through the market at this stage was such that matters got behind and also there may well have been difficulties with the vendors of the shares failing to deliver the scrip in a prompt manner, as a result of which there was substantial correspondence and enquiries were undertaken including enquiries with Perkins & Hargreaves who are the share registrars of Brierley. It is sufficient for me to say that I am satisfied on the evidence and indeed this is demonstrated by the abandonment of the counterclaim, that it does not appear objectively that the Defendant has been disadvantaged by the problems, although I acknowledge he will have suffered a degree of inconvenience and frustration.

Mr Knight in his submissions for Mr Straznik quite rightly indicated that the merits of the Winstone problem were not directly material but what was material to the matters that did arise was the fact that Mr Straznik at the relevant time when the orders are

alleged to have been given for the other shares felt, rightly or wrongly, a substantial sense of grievance and concern at what had transpired in the Winstone area. As Mr Knight put it in his submissions, this was the backdrop to the events of late October early November 1987.

As the Defendant's case was foreshadowed in his pleadings and his affidavit in opposition to an application earlier made for summary judgment, it appeared that the key issue was whether or not the Defenant had or had not placed the orders which the Plaintiff says he placed. However, during the course of the hearing the case took something of a turn in that it was suggested at one point by Mr Straznik in his evidence that he had indeed placed the orders but that they were conditional on him getting a refund of his money in respect of the Winstone transaction. I am afraid I cannot accept that proposition on the facts. It would have been a difficult proposition for the Defendant to have floated in any event because of the pleadings but I am not deciding the matter as a matter of pleadings. I think it extremely unlikely that the Plaintiff would have accepted the orders on that conditional basis. The evidence satisfies me beyond any doubt that the Plaintiff, although having some sympathy perhaps for Mr Straznik's position in relation to the delay, would not have accepted and did not accept that there was any reason why they should procure a refund to Mr Straznik in relation to the Winstone matter.

My views in this respect really put the Defendant into a difficult position. While I am unable to

accept that he placed what he called conditional orders or made a conditional purchase he can hardly now resile from that and go back to the proposition that he seemed to be espousing at one time in the case that he had not placed the orders at all. I refer in particular to the affidavit he swore on 21 September 1988 where in paragraph 4 he went so far as to categorically deny giving the Plaintiff any telephone instructions to purchase any of the shares which are in issue in this case.

Coming now to the assessment of the witnesses whom I heard, I state directly that I accept the evidence of Ms Averton and Mr Cooper. Mr Cooper I found to be a careful and convincing witness. He answered the questions put to him in a measured and considered manner. I believe him. Ms Averton is in my judgment a patently open and frank person. I am completely satisfied that she gave her evidence honestly and reliably. My views are fortified by the contemporaneous documents. The purchase orders were, I am satisfied, contemporaneously recorded. The Equiticorp order which I take by way of example, was first recorded at 8.50 a.m. on 23 October 1987. Ms Averton in her own handwriting has filled in the firm's "Buy" order form showing that Mr Straznik instructed her to buy 5,000 Equiticorp shares. The limit placed on the shares at that stage was $1.70. Subsequently I find that on 30 October 1987 Mr Straznik authorised a change to the limit up to $2.22 and it was on that changed limit that the shares were bought. There is no suggestion on the "Buy" form either in the Equiticorp case or in either of the others, that is to

say the Robert Jones and the Brierley order forms, that the purchase was in any way conditional on the resolution of the Winstone matter.

I find it inconceivable that Ms Averton would have filled in these contemporaneous "Buy" documents if she was not then being instructed by Mr Straznik accordingly. I am perfectly satisfied from the evidence that I have heard that Ms Averton knew Mr Straznik's voice. Without wishing to sound unkind, having heard Mr Straznik myself I think it is extremely unlikely that his voice might have been mistaken and I find as a fact that Mr Straznik did speak to Ms Averton on each of the occasions referred to and noted on the order forms and gave her the unconditional instructions which she has noted. Her evidence is further supported by a letter which Mr Straznik himself wrote on 10 December 1987 when he wrote to Ms Averton under the heading "Reference Winstone Ltd Shares". I do not overlook the fact that the first part of this letter constitutes a further recital of Mr Straznik's concern about the Winstone matter and his anxiety to receive a refund. He does however say and he appears to me from a perusal of the correspondence, not only this letter but the other correspondence in the agreed bundle, to be a man of some fluency in writing as opposed perhaps to his oral fluency. He says in the final part of the letter:-

> "With regard to my recent contracts with you, and any in the future, I have never renaged (sic) on any contract and will not do so now. I will be more than happy to fulfil my obligations on these contracts as soon as this long outstanding matter, not of my doing, is finalised."

The reference to contracts must be a reference to the Jones, Brierley and Equiticorp matters. It cannot be a reference to the Bell Resources matter because the statement of account clearly shows that as at 10 December 1987 Mr Straznik had already settled for the Bell Resources contract. The highest it seems to me at which Mr Straznik can put it in terms of this letter is that the three contracts in question were conditional. I have already rejected that proposition but it should be noted of course that he does not put the matter in that fashion in the final paragraph of his letter. So not only is it a question of my having found Ms Averton's evidence convincing when it was given, there is contemporaneous documentary support for it and it is corroborated, if one may use that word, to no little extent by a document emanating from the Defendant himself.

I have already made a general comment on Mr Cooper's evidence. His evidence is also aided by a contemporaneous note which he made on 1 March 1987 when he spoke to Mr Straznik about the matter. That note records that Mr Straznik indicated to Mr Cooper that he Straznik had bought the shares in November on the "understanding" that he would get his money refunded from the previous deal. That is a reference of course to the Winstone matter. I accept Mr Cooper's evidence that he spoke to Mr Straznik on a number of occasions before Mr Straznik indicated any suggestion of a denial of making the orders in question. Another piece of evidence I found of some

moment in support of the Plaintiff's case was Mr Straznik's own evidence that when he rang to speak to Ms Averton about the fact he had not received the Bell Resources contract note she, according to him, commented what about the contract notes for Equiticorp, Jones and Brierley. That is a near contemporaneous observation which it would be extraordinary for Ms Averton to have made unless at least in her mind she had been of the view that he, Straznik, had placed the orders for those shares.

Making all due allowance as I do for the language and other difficulties from which Mr Straznik suffers I am afraid I cannot accept his evidence. He may well be genuinely confused about matters. He has obviously taken a consistent line, as Mr Knight reminded me in his submissions, about the Winstone problem but I am unpersuaded by his evidence that there is any doubt at all about the validity of Ms Averton's evidence, she being the primary witness in relation to the giving of the orders for the shares in question. Mr Knight made some submissions in relation to the fact that Mr Straznik had not been sent statements of account and suggested that the parties may well have been at cross purposes in this area. It is possible that this is so and I need not make any finding as to whether or not the statement of account allegedly sent with one of the letters did in fact reach Mr Straznik. The key point is whether or not he ordered the shares in question. I am satisfied he did. I am satisfied that at the time no conditions were placed on the orders.

The onus is of course on the Plaintiff to prove its case on the balance of probabilities but it has done so in my judgment. I accordingly enter judgment for the Plaintiff against the Defendant in the sum of $15,797.81. There is a specific prayer for interest. I award interest at the Judicature Act rate of 11% on that amount from 18 May 1988, the date when the shares were sold, down to today's date. I award the Plaintiff costs according to scale together with disbursements and witnesses expenses to be fixed if necessary by the Registrar. For the avoidance of any doubt I direct that costs in relation to the application for summary judgment lie where they fall and I direct that the return Wellington Auckland airfare incurred by Ms Averton is to be treated as a proper disbursement together with her reasonable accommodation expenses, to be settled, if any disagreement arises, by the Registrar, if those expenses have been necessarily incurred. For the further avoidance of doubt the Plaintiff will have costs on the counterclaim limited to filing a defence to the same but not in relation to any question of preparation and of course not in relation to any question of trial, it having been abandoned before hearing.