JAS ACB 24/4 SET 3 [redacted] NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 1316/87

590

BETWEEN ELDERS PASTORAL LIMITED a duly incorporated company having its registered office at Auckland carrying on business at Hamilton and elsewhere as a stock and station agent and general merchant

Plaintiff

A N D NIGEL PEMBERTON Company Director of 2 Shepherds Avenue, Epsom, Auckland and SILK PEMBERTON LTD

Defendants

Hearing: 26, 27, 28 February, 1 March 1990

Counsel: K G Parker for plaintiff
M W Vickerman for defendant

Judgment: 11 April 1990

JUDGMENT (NO 2) OF EICHELBAUM CJ

The defendant Silk Pemberton Ltd agreed to purchase a farm property known as Dalmauri from Mr and Mrs Blackwell and the Blackwell Family Trust, the possession date being stated as 28 February 1986. The agreement referred to the transfer of crops of maize growing on the land subject to the purchasers accepting liability for the vendor's cropping accounts with Allied Farmers, now Elders Pastoral Ltd (the plaintiff). The indebtedness on the cropping accounts was not to exceed $120,000 at settlement date without the purchaser's written approval. An issue to be decided is whether, as the defendants contend, the part of the agreement relating to the crops was merely an option. The agreement was conditional, among other things, upon six other agreements all dated the same date

becoming unconditional by 20 December 1985 and being settled contemporaneously. Those agreements were between Silk Pemberton Ltd (or in one case Pemberton Holdings Ltd) as vendor and Mr and Mrs Blackwell and the Blackwell Family Trust as purchasers. In a broad way it appears that the overall effect of the transactions was to effect an exchange of the farm property owned by the Blackwells on the one hand for various Pemberton interests on the other.

Settlement was delayed until towards the end of June 1986. Before settlement, on 13 June 1986 a written agreement was entered into between the plaintiff, the defendant Nigel Pemberton, and Blackwell under which it was agreed that Pemberton would be liable to the plaintiff for the cropping accounts to a maximum of $120,000. In this respect the agreement was in the same terms as the original contract for sale and purchase to which however the plaintiff had not been a party. At the date of that agreement the debit balances of the cropping accounts totalled $131,031 (in this judgment I will whenever possible omit references to cents). There were subsequent credits (principally or perhaps entirely the proceeds of the crops) but leaving the accounts in debit. In these proceedings the plaintiff sued for the debit balance plus interest, while the defendants raised various counterclaims.

The agreement of 13 June 1986 having been entered into in Mr Pemberton's name alone, the claim was brought against him as defendant. During the trial, on application of the defendant the company, Silk Pemberton Ltd, was added as a defendant, solely for purposes of the counterclaim. For purposes of this judgment I can refer to "the defendants" without discrimination since nothing turns on the point.

Plaintiff's claim and interest

In the end the only matter outstanding was the question of interest.

Mr Wood, who at the relevant time was the Waikato Area Manager for the plaintiff company, having worked for the plaintiff and its predecessors for some 18 years, deposed that Elders charged interest on financing arrangements for all clients, the rate of interest varying depending on the risk. He said that in maize growing the interest charges were slightly higher than for other accounts. Mr Moore, the Regional Credit Manager, deposed that interest was compounded at the end of the month. He said that a constant rate was charged to the particular grower for the season until harvesting. As I understood his evidence, thereafter there was what he called a "penalty rate" for not clearing the account within the season, that is if the proceeds of the crop were insufficient to do so. So far as non-cropping accounts were concerned, he said that the interest rate fluctuated in relation to the current bank rate; although this did not apply inflexibly to all accounts. Mr White, the Regional Finance Manager, said that where Elders extended a finance facility to a grower the account bore a current rate of commercial interest.

In his evidence Mr Pemberton pointed to the fact that the document of 13 June 1986 did not say anything about interest. He said that he did not think the subject was specifically discussed. Asked whether he knew that Mr Blackwell had paid interest on the account prior to 13 June, he replied that he would have assumed that he did. He had understood that the farm account which Silk Pemberton Ltd had earlier opened included an obligation to pay interest. He did not believe that he had had previous dealings with stock and station agents. In re-examination he pointed out that at the time the 13 June agreement was signed, the harvest was beginning. The implication was that if, as Mr Pemberton no doubt expected, the proceeds from the crops were sufficient to cover the debits, the question of interest would have been of little significance.

Finally there was the evidence of E A Rainsbury, a chartered accountant, which was admitted in written form by consent. Ms Rainsbury, who had analysed the Elders accounts on

various bases, concluded that simple interest had been charged on the account balance on a daily basis at a fluctuating rate ranging from 20 to 30%. The interest was compounded by the addition of the accrued total for the month being added to the account balance at the end of the month.

The plaintiff's claim of $91,632.27 is calculated on a base amount of $33,360.88, arrived at as follows:

Cropping account liability taken over from Blackwell	$120,000.00	
Debits subsequent to 13 June 1986	27,982.64	
Proceeds of crop		114,621.76
Balance		33,360.88
	$147,982.64	$147,982.64

The balance above $33,360.88 represents interest for the period 13 June 1986 to 28 February 1990.

The plaintiff maintained that liability for interest arose in two alternative ways. First, it was a term implied in the contract between Mr Blackwell and the plaintiff. The plaintiff contended that by novation Mr Pemberton took over the obligations of Mr Blackwell, including the payment of interest on the debit balance. The Springhill cropping account entered into by Mr Blackwell provided:

> "5. The Grower agrees to pay interest at the rate of 23% per annum on all moneys owing to the Purchaser for seed or any other materials supplied by the Purchaser if the Purchaser shall so require."

The Whangamarino cropping account agreement contained a clause in the same terms save that the rate of interest was 21%. In evidence Mr Blackwell agreed that he had paid interest to the plaintiff on the cropping account.

The agreement of 13 June 1986 typed on the plaintiff's letterhead was in the following terms:

AGREEMENT between ELDERS - BLACKWELL - PEMBERTON

MAIZE CROPPING ACCOUNT

This Agreement sets out the responsibilities for the two maize accounts, Springhill Cropping and Whangamarino Cropping Account as agreed between Blackwell and Pemberton and our Company.

1 Mr Pemberton agrees to buy the two Cropping Accounts up to a maximum of $120,000 as at today's date 13th June.

2 Mr Maurice Blackwell agrees to accept responsibilities for any debit of those two accounts above $120,000 as of that day.

3 Mr Pemberton agrees to be responsible for all expenses and cartage, drying and harvesting of their maize, and is to instruct the contractors organised by our field staff accordingly.

4 Mr Pemberton is due for all credits from all grain off the two blocks in question, to be handled by Elders and any excess over cropping accounts to be paid to him.

5 Elders will identify the debt on each account as of the 13th June, and apportion the accounts to a maximum of $120,000 for the two cropping accounts. The balance will be transferred to Dalmauri Account. All maize credits will be credited to the cropping accounts. M Blackwell is to be solely responsible for the Dalmauri account and the Dalmauri account to no way relate to the farm.

6 Mr Pemberton agrees to pay direct the contracting charges and agrees to pay our Company one month after receiving the final statement, any shortfall should there be one.

This AGREEMENT to be signed by both parties all parties below.

No doubt it is correct to refer to the agreement as a novation, although the transaction was a little more complicated than the ordinary case where A agrees to take over B's liability to C. Had the accounts totalled no more than $120,000 that would have been the position, but in fact they exceeded that figure. However, as emphasised in Lambly v Silk Pemberton Ltd [1976] 2 NZLR 427, 434, the concept of novation involves a new contract. The critical question here is what the new contract provided in regard to interest. As has been seen, so far as overt expression went it was silent on the

topic. The essentials of the agreement, for present purposes, was that Mr Pemberton agreed to "buy" the cropping accounts up to a maximum figure, that he would receive credit for the harvest, that he would be entitled to any excess over the liability, and that in the event of a shortfall he would be responsible for it.

The effect of the three cornered arrangement was that the plaintiff was providing finance of $120,000 towards the completion of the transaction between Pemberton and Blackwell. It was short term finance, since the harvest was imminent and the account would be repaid or reduced by the proceeds of the maize crop harvest. Any balance was payable within a further month of a final statement.

Although unversed in farming matters, by 13 June Mr Pemberton would have understood that the plaintiff provided a facility in the nature of a current account for cropping purposes. In effect Elders financed the grower's expenditure in relation to the crop in return for gaining the benefit of the crop itself for its marketing purposes. It is inconceivable that such a transaction as between stock and station agent and grower should not involve the payment of interest, and I find it similarly inconceivable that the agreement of 13 June, which arose out of that situation as between the plaintiff and Blackwell, should be unaccompanied by a liability for interest.

It is I think one of those cases where the processes of interpretation and implication tend to merge. I would interpret the 13 June 1986 agreement as meaning that except as varied, Mr Pemberton agreed to be bound by the same obligations, including those concerning interest, for which Mr Blackwell was previously liable. Alternatively, if implication is required, in my opinion the same result is achieved. The situation fulfills all the five requirements set out in the majority judgment of the Privy Council in

BP Refinery (Western Port) Ltd v Shire of Hastings (1977) 52 ALJR 20, 26.

As to Mr Blackwell's previous obligation, in my opinion this has to be decided according to his liability under the respective cropping accounts. Since they specifically dealt with the question of interest I do not see that the issue can be governed or influenced by the provisions of the general Dalmauri account.

The clause as to interest contained in the cropping accounts has already been quoted. On a literal reading it does not wholly cover the issue since it relates only to "seed or any other materials supplied by the purchaser". Having regard to the nature and purpose of the agreement however, the term "materials" should be interpreted broadly as encompassing any other costs discharged by the purchaser (that is the plaintiff's predecessor) at the request of the grower in relation to the cereal cropping covered by the agreement.

As I interpret clause 5 of the agreement, it provides for simple interest, at the rate of 23% per annum in the case of Springhill, and 21% in the case of Whangamarino. Accordingly interest will have to be determined separately in respect of the debit balance in either account, after apportioning the sum of $120,000 between them as envisaged in clause 5 of the agreement of 13 June 1986. There will be judgment for the plaintiff on liability. If the parties are unable to agree as to quantum I will direct an enquiry before the Registrar or an accountant, or alternatively the matter may be referred to a Master or a referee. Leave is reserved to apply in that respect.

The plaintiff contended for compound interest. The submissions on behalf of the plaintiff did not expressly contend that clause 5 of the cropping agreement gave rise to a claim for compound interest. To the extent that this was the intention, I reject the argument, on the wording of the

clause. An argument was also based on custom and usage in the particular industry. The requirements of proof were discussed in Woods & Anor v N J Ellingham & Co Ltd & Anor [1977] 1 NZLR 218. I do not think it is necessary to say any more than that the evidence of custom and usage in the stock and station agents business, as distinct from evidence as to the plaintiff's own, fell far short of sufficing to establish any such custom or usage.

There was a further argument founded on judicial notice. It might be possible to take judicial notice that stock and station agents charge interest on debit balances in their customer's accounts, but I am unable to see any basis for finding the requisite degree of certainty as to the nature and rate of such interest.

Counterclaims

Interest apart, the substantial issues in the proceeding arose on the counterclaims filed by the defendants. There were three separate counterclaims as follows:

1 Negligent Misstatement

The defendants alleged that prior to entering into the agreement to purchase the property referred to in the pleadings, the defendants made enquiries of the plaintiff as to various aspects of the crop, that it was made known to the plaintiff that the purpose of the enquiries was to obtain sufficiently accurate information so as to enable the defendants to decide whether or not to purchase the property, that the plaintiff owed the defendants a duty to take reasonable care in giving advice in response to the defendants' enquiries; that the plaintiff made certain representations which were untrue and that the plaintiff failed to take reasonable care in giving advice, as a result of which the

defendants suffered loss. The advice alleged to have been given was as follows:

(a) The maize crops growing upon the said properties were planted to the highest standard with a first class yield to be expected.

(b) The accounts of Mr M Blackwell] with the plaintiff were not "loaded" which expression the plaintiff intended to mean and the defendants understood to mean that the accounts represented reasonable and bona fide charges genuinely and normally incurred in the course of preparing the soil, planting and growing the maize crop.

(c) The maize crop on the said properties would achieve a high financial return upon harvesting for sale.

Damages sought were:

(a) Excess preparation costs

Total actual costs $93,664.89
Normal/reasonable costs $39,689.19
Excess preparation costs $53,975.70

(b) Shortfall in price

Total first class yield 899.91 tonnes
at $236.00 per tonne - $212,378.76
Actual yield 659.07 tonnes
at $190.00 per tonne - $125,223.30
Shortfall in price - $87,155.46

(c) Deficiency in yield

Total actual yield 659.07 tonnes
First class yield 899.91 tonnes
Deficiency in yield 240.84 tonnes
at $236.00 per tonne - $56,838.24

2 Misrepresentation

Under this cause of action the defendants alleged that they were induced to enter into the agreement of 13 June 1986 by the same representations already set out and by further representations (or a confirmation of the previous ones) in a letter written by the plaintiff dated 12 June 1986. The same damages were claimed as under the first counterclaim.

3 Late Harvesting

Under this heading the defendants alleged that it was an implied term of the 13 June 1986 agreement that the plaintiff would supervise the harvesting of the crops to ensure that the harvest would be completed so as to ensure the best possible yield. It was alleged that in breach of that agreement the plaintiff failed to supervise the harvest competently, and in particular failed to ensure that it was harvested timeously, with the result that the crop was spoiled by rain and the difficulties of harvesting wet crops from sodden ground. Under this heading the defendants claimed as damages the third of the three headings referred to in the earlier counterclaims.

The Contract of Sale

The copy exhibited was dated ".. day of December 1985". I am satisfied that it was executed in December or early January; the exact date is of no moment. For convenience I will from time to time refer to it as the December 1985 agreement.

I come immediately to the question whether, as the defendants asserted, the provisions relating to the crops merely conferred an option. The clause in question read:

> "For the consideration aforesaid the Vendor hereby Transfers, sets over and assigns to the Purchaser all that and those crops being 81 ha of maize now actually sown in and growing upon the land not only whilst growing but afterwards when cut and separated from the soil, subject to the purchasers accepting liability for the Vendor's "cropping account" to Allied Farmers' Cooperative Limited as per the attached application for credit and contract agreement for cereal cropping PROVIDED FURTHER that the Vendor warrants that:
>
> (a) The indebtedness on its cropping account will not exceed $120,000.00 at settlement date without the Purchaser's written approval (any difference between the cropping account and $120,000 on settlement date will be paid in cash by the Vendor).

(b) The Vendor shall do all things necessary to farm and manage the crop and land in a proper and husbandlike manner and keep the said crop properly cultivated, fertilised, pest free and weed controlled in accordance with best principles of farm management to the date of settlement.

(c) The maize crop shall be at the Vendor's risk until settlement date and the Vendor shall keep the crop insured to full insurable value. Should the crop be destroyed or so damaged so as to render the crop unfinancial in the opinion of the Purchaser then the Purchaser shall not be bound to purchase the crop nor to take over the Vendor's cropping account and the purchase price shall be reduced by the amount of the sum received by the Vendor from the insurer of the said crop in case of an uninsured loss the amount of the reduction in purchase price to be allowed herein (if not mutually agreed upon by the parties hereto) shall be decided by the arbitration of a reputable representative of the grain merchants association."

By way of background it should be noted that in the normal course neither of the crops would have been ready for harvesting until about June. In the event settlement did not take place until that month, but as already mentioned the agreement envisaged that settlement would be in February.

The option, in the defendants' submission, arose through the expression "subject to the purchasers accepting liability for the vendor's cropping account". In the plaintiff's submission the words "subject to" did not confer a condition but simply linked the respective obligations of the parties.

The words of transfer and assignment are not cast in any conditional mode and on their face are intended to take effect upon settlement. Further, there is no provision whatever regulating the mechanics of the exercise of an option. Nor does the clause deal with the situation, clearly envisaged by the February settlement date, that settlement would take place long before the harvest. If the purchaser decided not to exercise the "option", provision was required to enable the vendor to have access thereafter in order to attend to the crop and in due course to harvest it. Another point is that the language of para (c) clearly envisages that the purchaser is

bound to take over the crop. On the defendants' approach that might be explicable on the footing that it applied to the situation where the option had already been exercised; but the clause goes on to provide that in the event of destruction of the crop not only is the purchaser not liable to take over the cropping accounts, but the purchase price is to be reduced by the amount received by way of insurance, or (in the event of an uninsured loss) such amount as is agreed or decided by arbitration. Thus (if the defendants' argument is correct) the curious concept arises that the total consideration included allowance for the crop but was not adjustable according to whether the option to purchase the crop was exercised.

Looking at the agreement for sale and purchase as a whole I am satisfied that the defendants' contention should be rejected.

Attention was drawn to the fact that this conclusion was consistent with the way that the defendants' advisers saw the position initially, judging by the form of the pleadings and the terms of the initial letter of claim. However, I do not think that this should be given any weight in deciding a matter of construction.

The evidence as to what occurred between the date the contract was executed and its eventual settlement was sparse. Mr Pemberton said that settlement did not proceed initially because Mr Blackwell was in default. Mr Blackwell agreed that he was having financial difficulties. I infer however that this was not the only problem exercising the minds of the parties. There was a hint that Mr Blackwell had some query about the properties he was receiving by way of exchange. It seems that for his part, Mr Pemberton must have had some reservations about Dalmauri, otherwise it is difficult to see the point of the March meeting at the farm. Mr Blackwell spoke of some matters of difference and the fact that a six point agreement was reached. No copy of this document was available, but according to Mr Blackwell (and nothing emerged in the evidence to contradict him) it did not vary the original

proposition much. I conclude that fairly soon after the meeting at the farm, the parties reached an agreement involving some give and take, not of a major nature, the basic proposition being that the parties would go ahead with their original agreement. Thereafter, again there was a delay in settlement because of difficulties on Mr Blackwell's side, but presumably Mr Pemberton was content simply to wait.

The Farm Meeting

This was attended by Messrs White, West and Higgins representing Elders, and Mr Pemberton and Mr Young. The latter was an urban valuer whom Mr Pemberton wanted to look at one particular block on the farm. Mr White's field was finance, Mr West was knowledgeable in regard to the maize, and Mr Higgins's interest was livestock. I have already said something about Mr Pemberton's motivation to have a meeting on the farm. I am satisfied that his lack of farming knowledge was obvious. As to the motivation on Elders' side, the Elders representatives were aware, at least in broad terms, of the nature of the deal signed between Pemberton and Blackwell. Mr Blackwell, who was their customer, owed them considerable sums and as already noted was in a degree of financial difficulty. Mr Pemberton was the purchaser and a prospective customer. I do not say that these considerations dominated the thinking of the Elders representatives, but they could hardly have been absent from their minds.

The conversation concentrated on the maize crops. Two separate areas had been planted - Whangamarino, which had carried a maize crop the previous season, and Springhill, which was being cropped with maize for the first time. According to Mr Pemberton, in relation to each of them Mr West remarked that there was an excellent crop, and that there should be a good commercial yield from it. Mr Pemberton deposed that he was told that the crop had been very well planted. He questioned the amount of the cropping account, saying that it seemed to him a lot of money to which Elders responded that it was normal

for something that had been so well looked after. Mr Pemberton said he enquired whether all that amount of money had gone into things for the crop or whether the account had been loaded up with other expenses. The response was that the account had definitely not been loaded, and the money had been spent on putting the crop in.

Mr Young, who I accept as a credible witness, confirmed that Mr Pemberton enquired as to the quality of the maize crop and got the response that it was a good crop and that Elders expected to get a good yield from it. Mr Young did not strike me as a man given to hyperbole and I do not regard his evidence as necessarily inconsistent with the use by Mr West of more laudatory expressions. As to the cropping accounts, he recalled that Mr Pemberton asked whether the expenditure was genuine and said that the gist of the answer was that it was honest and that he could look at the invoices and check the accounts out for himself.

Mr Higgins was not called. In his evidence Mr White spoke mainly about the enquiry concerning the accounts, as one would expect since finance was his particular field. He said that they "put a strong bias" that there were cultivation costs. Asked to explain the use of the word bias he replied that that was best described as caveat emptor. When later I asked Mr White to try to explain this passage to me, he gave evasive answers. Mr White also gave what I thought was an imaginative account of conversation he had with Mr Young who he professed was a farm adviser, knowledgeable in farm financial matters. Mr Young was nothing of the sort, nor, I am satisfied, said anything to give that impression. In the circumstances I do not feel I can get a great deal of assistance from Mr White's evidence.

Mr West said that at the time of the inspection he thought that the crop looked very good and in fact believed there would be a good yield. He accepted that he might well have said that it was an excellent crop and that there should be a good

commercial yield. He did not think that he used the words "first class". Mr Pemberton did not use those words himself in his evidence in chief, but in cross examination took the opportunity, rather readily I thought, to expand his evidence by adopting that expression. I am not satisfied however that it was used.

As to the cropping account, Mr West's evidence was that he said to the best of his knowledge all the costs on the cropping account pertained to the crop but that some of the charges should be looked at closely. He added that this was said in a roundabout manner, that the Elders representatives "just sort of hinted strongly" that Mr Pemberton should look into it. What Mr West was referring to was that a very substantial item in each of the cropping account related to charges paid to "Mercer Contractors" to prepare the ground - $18,000 in the one case, $16,000 in the other. Who constituted "Mercer Contractors" (or indeed whether there really was any such separate entity) did not emerge with precision but clearly Mr Blackwell was the proprietor or a proprietor, possibly in partnership with his son and another. The accounts themselves contained a minimum of detail. It was not suggested that anything underhand was involved, and in particular it should be noted that the accounts were submitted before the contract with Mr Pemberton was made. At the time the effect of the arrangement may simply have been that Mr Blackwell and/or his son received an advance from Elders; the quantum of the account only became significant when the arrangement was made that Mr Pemberton would assume responsibility for the cropping accounts.

The gist of Mr West's evidence on this point as I understood it was that he believed he was hinting to Mr Pemberton in what he himself described as a roundabout way that it was not normal for a stock firm to allow a farmer to book up his own charges for cultivation against a cropping account. That is evidently how Mr West viewed what had occurred, and as I have said, it may well be an accurate way to

describe it. To complicate the issue further, Mr Pemberton accepted that he knew that Blackwell junior had done the cultivation. Mr Pemberton said that was not what he objected to, his concern was to be satisfied that what had been paid out was within normal limits. Mr West believed that while the total of the charges were high, they were within normal limits.

One should not become over semantical about the meaning of "loaded" and other aspects of this part of the conversation. I think the gist of it was plain. Mr Pemberton wanted to know whether the account which he was being asked to take over was within normal limits. That I believe was how Mr West understood the enquiry.

Important light on this part of the "farm meeting" conversation was thrown by events at another discussion held on the farm late in 1986 between Mr West and Mr Pemberton. Mrs Cook, who with her husband was managing the farm then, was present, as was (by chance) a neighbour named Michael Francis. The subject under consideration was what crop to plant next, and it was in this context that according to Mr Pemberton, he remarked that Mr West's previous advice had not been very good. To this Mr West responded that the account had been loaded to hell. On being challenged by Mr Pemberton that accordingly he had lied to him at the farm meeting, Mr West then said that he had, but he had had to look after his client. In their own different words Mrs Cook and Mr Francis, each of whom I accept as an honest and credible witness, deposed to a conversation in terms that Mr West agreed that the account was loaded and that he had had to protect his client. Mr West did not deny that there was a conversation along these lines. He maintained that he did not use the word "loaded" but said something "in stronger terms" on the lines that Mr Blackwell should not have been paid. However, the tenor of Mr West's evidence was that he was merely repeating something he had said to Mr Pemberton at the initial farm meeting. If that was correct, that is to say if indeed Mr West had said that to Mr Pemberton at the time, there would have been no

question of "protecting his clients", and I am satisfied from the evidence of Mrs Cook and Mr Francis that at the later meeting Mr West said something to that effect. That can only be regarded as an excuse or a reason for not telling Mr Pemberton about it in the first place. There is also the unsatisfactory evidence of Mr White mentioned earlier; if it confirms anything it is that nothing was said to Mr Pemberton in plain terms about the account being loaded.

I can now summarise my views as to the defendant's allegations concerning the three representations:

(a) The plaintiff's representatives said that the maize crop was planted to the highest standard. As to the yield to be expected, I do not believe they used the expression "first class" but they said a good commercial yield could be expected, or words to that effect.

(b) In response to a question from Mr Pemberton whether the accounts were loaded, Mr West replied to the effect that the accounts were normal.

(c) Mr West also said that it was an excellent crop and that there should be a good commercial yield from it.

Counterclaim for negligent misstatement

(a) Duty of Care

At the time of the "farm meeting" the Elders representatives were aware of the existence of a contract between their customer and Pemberton or his company, and that settlement had not been completed. Elders had a financial interest in the transaction : first it was in the plaintiff's interest to see that Mr Blackwell's indebtedness was cleared; secondly they wished to secure Mr Pemberton's business. It was apparent to them that Mr Pemberton was not knowledgeable in farming matters. Mr West was familiar with the history of the

crop, and with the previous season's maize growing on the same property. Elders had access to the details of the cropping account. It would have been apparent to the Elders representatives that Mr Pemberton was seeking meaningful information to assist him to decide whether to proceed with the transaction. In the circumstances I am satisfied that there was a special relationship between Mr Pemberton and Elders so as to give rise to a duty on the part of Elders to exercise reasonable care as to the accuracy of information within the scope of the duty which Elders made available to Mr Pemberton. These propositions, which were not controverted in argument on behalf of the plaintiff, fall within well known formulations of liability for negligent misstatement: Esso Petroleum Co Ltd v Mardon [1976] QB 801 per Lord Denning MR at p 820; Scott Group Ltd v McFarlane [1978] 1 NZLR 553, per Richmond P at p 566, and Capital Motors v Beecham [1975] 1 NZLR 576 (Cooke J) at p 580.

(b) Did Plaintiff make negligent misstatements?

I have set out my findings as to the representations made. As to the statement that the crop had been planted to the highest standard, that I believe was correct. Regarding the accounts, the statement was not correct. The accounts were a good deal higher than normal and contrary to Elders' normal practice, they had permitted them to be charged, in effect, with the cost of the farmer's own preparatory work. Finally, as to the statement that it was an excellent crop and that there should be a good commercial yield from it, to make the former statement correct to a person unfamiliar with maize growing or the particular property, it should have been qualified by pointing out that while it was an excellent crop for the quality of the land on which it was planted, it could not hope to be an excellent crop by absolute standards. The evidence was unanimous that neither block was well suited for growing maize. That may be open to the criticism that it is requiring too meticulous a standard. Be that as it may, the second part of the statement that there should be a good commercial yield was patently wrong and unless explicable on

the basis that Mr West had forgotten the calculations he had earlier made for Mr Woods (as to which I have to give him the benefit of the doubt) would have to be regarded as deliberately misleading.

Further, I have little difficulty in concluding that the incorrect statements were made in breach of the duty of care. Mr West and Mr White were aware of the nature and makeup of the cropping accounts. Indeed their version of the conversation, which I have been unable to accept, was that they put Mr Pemberton on notice that the accounts had an unusual feature. As to the "good commercial yield," in the context that reference would reasonably have been taken as meaning not merely that there would be a good crop, but that the purchaser would make money on the transaction. Assuming that Mr West had forgotten about his earlier calculations, clearly he had the means at hand to make a rough calculation which readily would have shown that the best the purchaser could hope for was to break even.

(c) Causation

The counterclaim alleged that "prior to entering into the agreement to purchase the property referred to in paragraph 4" the defendants made enquiries of the plaintiff as to the viability of the "said property" as a maize farm, the quality of the maize therein planted and whether the vendor's account with the plaintiff represented charges reasonably and normally incurred in the growing of maize in the quantity and of the type growing upon the property. The defendants further alleged that in making such enquiries they had made known the purpose, namely to obtain sufficiently accurate information to enable them to decide whether or not to purchase "the property".

Paragraph 4 referred to an agreement dated "December 1985" to purchase two blocks of land identified earlier in the pleading as Springhill and Whangamarino. This and the further details given make it plain that the agreement referred to was

the written agreement bearing the date ".. day of December 1985". Since the discussion at which the negligent statements were made did not take place until some months after the execution of the agreement, it is plain that as pleaded, the claim cannot succeed. However, in opening the counterclaim counsel for the defendants advanced the proposition, already dealt with, that rather than a single agreement to buy the land and take over the crops, the agreement was one for purchase of the land with an option to take over the crops subject to the defendant assuming liability for the cropping accounts. Thus the counterclaim for negligent misstatement was advanced on the footing that the statements caused the defendants to exercise the option. Although that is certainly not the way the claim was pleaded, it proceeded on that basis without objection from the plaintiff. Since however I do not accept the defendants' interpretation of the contract as including an option, the claim for negligent misstatement must fail on that basis also.

(d) Damages

The basic rule governing the award of damages in tort is that the plaintiff is to recover that sum which, so far as money can, will put him in the same position in which he would have been had he not sustained the wrong. For the cause of action now under consideration, prima facie the measure of damages is the difference between the price paid and the fair value at the time of purchase, Scott Group Ltd v McFarlane per Cooke J at pp 585 and 587. In the present context the "price paid" and the "fair value at time of purchase" relate to the property as a whole. The evidence led as to damages was confined to evidence relating to crop yields of various standards, and usual costs. On this aspect the decision in Scott Group Ltd v McFarlane was based on Canavan v Wright [1957] NZLR 790, likewise a decision of the Court of Appeal. The law as to damages laid down in those cases is plain and I cite the following passage only to provide the foundation for answering a submission made by counsel for the defendants. It

is from the judgment of Barrowclough CJ in Canavan v Wright at p 795:

> "It is of course, trite law that in assessing the damages for fraudulent misrepresentation inducing a contract of sale and purchase, that which is to be ascertained is ordinarily the difference between the price paid for all that was bought - in this case land, stock and plant - and the fair value of all that was bought. If the excess of the price actually paid for the land was exactly counterbalanced by the purchaser getting his stock at an undervalue, there would in the end be no recoverable damages at all."

On application of the law as set out in that passage it was found that the award of damages for which judgment had been entered in the Court below could not be justified, and the judgment was set aside. A further aspect of the appeal however related to a separate award in respect of the loss of stock. The basis of the plaintiff's claim in that respect was that as a result of the misrepresentation he had been induced to carry more stock than the property could take. Accordingly he had sustained loss through stock dying of starvation. As Barrowclough CJ pointed out at p 799, that head of damages was of an entirely different nature. It was described as something in the nature of a loss of profits, and the question for the Court was whether it was recoverable as a head of damages in an action for deceit. In the present case, counsel in the course of submissions observed in relation to Canavan v Wright that although in that case the Court had before it no evidence from which the fair value of the land could be arrived at, an award was made with respect to the losses on the stock. On analysis it will be seen that the case encompassed two distinct headings of claim and that the Court's decision upholding the award in respect of the loss of stock in no way derogated from the principles applicable to the main heading, which concerned the value of the land and stock the plaintiff was induced to buy. The present problem relates to precisely the same subject matter as the first head of claim in Canavan v Wright and has no analogy with the second. There is no evidence that "the property" the subject of the December 1985 contract was worth any less than the consideration given. Damage being of the

essence of this cause of action, it must fail on this ground as well.

Counterclaim for contractual misrepresentation

The circumstances in which this head of counterclaim came to be added during the course of the hearing are set out in my judgment delivered on 1 March 1990.

(a) Misrepresentations

The contract of 13 June 1986 has already been set out. To repeat and summarise, it recorded that Mr Pemberton agreed to "buy" the two cropping accounts up to a maximum of $120,000 as at the date of the agreement. Mr Blackwell agreed to accept responsibility for any debit in excess of that figure. Mr Pemberton was to be responsible for all expenses for cartage, drying and harvesting and would receive all credits for the grain from the two blocks in question. Mr Pemberton agreed to pay Elders any shortfall in the accounts should there be one.

As between Blackwell and Pemberton, the agreement gave effect to the provisions relating to the maize crop contained in the December 1985 contract. From Elders' point of view, its importance lay in the fact that they now had a direct contractual nexus with Mr Pemberton, and could look to him in the event of a shortfall. The agreement also provided that Mr Pemberton would dispose of the crop through Elders. Mr Blackwell had agreed to do so previously, but again Elders now obtained the benefit of a personal covenant from Mr Pemberton in that respect.

I have already made findings as to the nature of the statements made by the Elders representatives and the extent to which they were incorrect.

Obviously the statements made contain an element of opinion or judgment. Generally of course, a statement of opinion as distinct from a statement of fact is not actionable as a misrepresentation. However, as was said by Bowen LJ in Smith v Land and House Property Corporation (1884) 28 ChD 7:

> "...if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion." (p 15)

On this basis I find that Mr West's statement that the accounts were normal carried with it the implication that they were normal having regard to his knowledge of the actual content of the cropping accounts. Similarly his statement that it was an excellent crop and that there should be a good commercial yield from it in my opinion implied that on Mr West's expert knowledge of crops on various properties, this one ranked in the top band while the reference to good commercial yield implied that unless there was some detrimental development (there was none) the yield from the crop would cover the expenses and leave a reasonable margin.

(b) Inducement

It is well established that (as was the case prior to the enactment of the Contractual Remedies Act 1979) it is sufficient if the misrepresentation constituted an inducement to contract; it does not have to be the only one.

Simplistically one might say that Mr Pemberton entered into the 13 June agreement because he had no choice. He had decided to go ahead with the deal with Mr Blackwell. He needed to market his maize; had he endeavoured to do so through anyone else he would have subjected Mr Blackwell to the possibility of an action for breach of contract by Elders into which he would have been drawn. The terms of the 13 June agreement were no different from what he would reasonably have expected, given that he had decided to carry the December 1985 contract to

completion. Nevertheless, I am of the opinion that the representations and assurances given to him by the Elders representatives at the farm meeting influenced him in deciding to go ahead with the contract and thus in turn played some causative part in Mr Pemberton joining in the 13 June document. The question remains whether doing so caused him any damage beyond that which he would have suffered without it.

I now need to deal with two other propositions advanced on behalf of the defendants. First, in his final submissions counsel for the defendants developed an alternative argument : that by the time of the farm meeting Mr Blackwell was in default; Mr Pemberton could have cancelled the contract, but was induced by the representations not to do so. In his response counsel for the plaintiff pointed out that no such basis had been pleaded.

The Court should not be over-meticulous about the wording of pleadings, if the substance of the allegation is clear. However, I do not see how one can read into the defendants' allegations the contention that in or about March 1986 the December 1985 agreement had become voidable at the option of the purchaser who was then induced to confirm the December 1985 agreement by representations made at that time. Nothing else in the pleadings signalled any such case, nor did Mr Pemberton's own evidence do so. He concentrated on the theory that he had an option to buy maize, an approach which of course did not require any enquiry as to whether by reason of Mr Blackwell's default the December contract had reached a stage where the purchaser had a choice whether to proceed or cancel. In the result, Mr Pemberton was not cross examined on that nor was there any need to go into aspects such as whether the cause of the delay was solely default on the part of Mr Blackwell, whether a notice to complete was required, whether Mr Pemberton would have been entitled to give such a notice, or whether he would have done so. It was not until Mr Blackwell when subsequently called on behalf of the defendants gave his evidence that it emerged there had been a

meeting between the two at which various points of disagreement had been sorted out and a decision made to proceed to completion. The way in which I have framed the issues point up another difficulty : on this basis the defendants' case would have the character of a claim for the loss of a chance, that is, the opportunity of avoiding the prior contractual obligations. Accordingly, development of the counterclaim on the alternative basis would have required the exploration of factual issues. The pleadings not containing or foreshadowing any such allegation, it would be wrong now to allow the defendants to have the counterclaim dealt with on that footing. (For the sake of completeness I record that no such argument was advanced in connection with the counterclaim for negligent misstatement.)

Secondly, the defendants relied cumulatively or alternatively on a letter written by the plaintiff the day before the 13 June agreement. On any view, by then Mr Pemberton had decided to complete settlement of the December 1985 agreement. The letter did not play any causative part in the defendant entering into the contract.

(c) Damages

The Court of course is now concerned with the contractual not the tortious measure. Normally it is the difference between the value of the subject matter as it is, and the value as it would have been had the representation been true, on the basis that the purpose is to put the claimant in the position in which he would have been had the contract been performed.

On the findings I have made, prior to signing the contract of 13 June 1986 the defendants were bound to take over the maize crop and liable to take over Blackwell's cropping account up to a maximum of $120,000. Any loss suffered by the defendants was inextricably bound up with those two obligations. Entering into the contract of 13 June added nothing in these two respects. Accordingly, the defendants did

not suffer any loss as a result of entering into the 13 June contract. One cannot be said to lose something which is already lost.

Accordingly, although the defendants have made out their cause of action, they are entitled only to nominal damages which I fix at $1.

Counterclaim for late harvesting

As between Elders and Mr Pemberton, it was common ground that the latter was relying on the former to make sure the crop was harvested. Mr Pemberton did not have the necessary expertise or contacts.

In the form in which it was pleaded, the counterclaim encompassed both the Springhill and the Whangamarino harvesting, but as the evidence progressed it became apparent that any complaint related only to the latter block. The harvesting contractor Mr Moffat, whose evidence I accept except where otherwise indicated, said he harvested Springhill between 23 May and 12 June. At some stage, probably while engaged in work on Springhill, he became aware that the farm was about to change hands. Although Elders made the arrangements, the contractor looked to the owner for payment. Not unreasonably, when he heard of the proposed change of ownership Mr Moffat, who had not had any dealings with Mr Pemberton, thought it prudent to seek an assurance from Elders that he would be paid for his work. However, in the event I do not believe that that held up the harvesting at all. When he received the assurance that Elders would guarantee payment, the Whangamarino crop was not ready for harvesting because the grain moisture had not yet come down to the appropriate level. Mr Moffat commenced to harvest Whangamarino on 18 or 19 July, but was unable to complete the work because of the onset of wet weather. However, by then he had harvested all but 18 or 23 acres and had been able to carry this out in reasonable conditions. Mr Moffat was an experienced and competent contractor. The

evidence does not support the proposition that anything in the manner or the time of harvesting had caused any loss.

The evidence did not clearly establish the time of completion of the balance of the work, which should only have taken a day or so. Mr Moffat thought it was about 9 September, but there were no records to confirm this. His invoice was dated 30 September and one would have thought that it would have been sent out reasonably soon after completion. Mr West thought that the completion was in late September or early October, basing this on the weighbridge documents he had received which were dated around 6 and 8 October. It is possible that there was some delay between the completion of harvesting and the weighing of the crop during which time the grain would have been in the contactor's bins, but again it is unlikely that this delay would have been very extensive; no more than say a week. I conclude that Mr Moffat's memory as to the date of completion must be mistaken, and that in fact it took place around the end of September.

On the evidence, this was later than ideal, but the implied term cannot be regarded as imposing an absolute duty on Elders to harvest a particular crop at the optimum moment, merely to use its reasonable best endeavours to have the crop harvested at an appropriate time. An owner relying on a stock and station agent would realise that the agent had a number of customers to service, that any contractor engaged would necessarily have a number of harvests to carry out, and that given that more than one crop would probably be ready for harvesting at the same time, some would necessarily have to wait their turn. On this footing, the evidence does not establish that Elders were in breach of their obligations.

The views I have expressed are not in accordance with Mr Blackwell's opinion. Although settlement had taken place he continued to visit or pass by the farm and said he could not understand why Whangamarino had not been harvested. He wrote a letter dated 19 August 1986 critical of the contractor and the

persons responsible for the organisation of the harvest. In so far as the letter implies that at that date none of the Whangamarino block had been harvested, I think that Mr Blackwell's impression was mistaken, and I note that the sentence making that allegation commences "as far as the writer is aware", indicating that Mr Blackwell had not made any close inspection. At any rate, in the absence of acceptable and properly qualified evidence, I am not prepared to accept it as proven that the Whangamarino crop was ready to be harvested at a significantly earlier date than the time the work actually commenced.

Even had I reached a different conclusion regarding liability, the defendant would not have been entitled to more than nominal damages. I bear in mind that although not personally involved, Mr Moffat had a position to defend. Nevertheless, I am inclined to accept his view that even in relation to the remaining 18 or 23 acres, any damage to the crop caused by the delay was slight. The evidence does not establish any quantifiable loss.

Conclusion

The counterclaim for negligent misstatement has failed but I consider that the proper form of judgment is nonsuit. On the cause of action based on contractual misrepresentation, the defendants will have judgment for $1. The late harvesting counterclaim results in judgment for the plaintiff.

Costs

In the expectation that the parties will be able to agree on quantum, I will fix costs now. Should there have to be a further hearing, its costs can be dealt with separately.

In summary, the plaintiff has succeeded on its claim, which in the event was not in contention at the trial. Each side has been partially successful in regard to interest. The defendants have succeeded on one counterclaim but only to the extent of nominal damages. They have failed on the other two. Justice will be done if I allow if I allow the plaintiff (a) costs of issue and preparation for trial on the amount recovered by the plaintiff (b) costs on the statement of defence, and preparation for trial, in relation to the counterclaims (c) as to trial, a single set of costs as on a claim for $197,965, being the total of the three heads of damages under the counterclaims. In addition the plaintiff is entitled to disbursements relating to both claim and counterclaim, and witness expenses, all as fixed by the Registrar. I certify for three extra days of trial. If other certificates are sought, or there are any other matters of costs requiring decision, counsel may submit memoranda.

Thorne Proceedings, CJ

Solicitors: Tompkins Wake, Hamilton for plaintiff
Keegan Alexander Tedcastle & Friedlander, Auckland for defendants

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 1316/87

BETWEEN ELDERS PASTORAL LIMITED a duly incorporated company having its registered office at Auckland carrying on business at Hamilton and elsewhere as a stock and station agent and general merchant

Plaintiff

A N D NIGEL PEMBERTON Company Director of 2 Shepherds Avenue, Epsom, Auckland and SILK PEMBERTON LTD

Defendants

JUDGMENT (NO 2) OF EICHELBAUM CJ
