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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP.2091/87

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BETWEEN: JORDAN SANDMAN SMYTHE LIMITED a duly incorporated company having its registered office at 2nd Floor, Centrecourt Building, 131-141 Queen Street, Auckland and carrying on business as sharebrokers

Plaintiff

AND: JOHN McKITTRICK of 252 Whangaparoa Road, Whangaparoa, North Auckland, Company Director

Hearing: 8 February 1990

Counsel: S. Stokes for Plaintiff
G.R. Joyce QC for Defendant

Judgment: 9 February 1990

ORAL JUDGMENT OF TOMPKINS J

On 21 October 1987 in a telephone discussion between the defendant and Mr White, an employee of the plaintiff, the defendant instructed the plaintiff to purchase on his behalf 15,000 Euro National Corporation shares, 5,000 Chase Corporation Ltd shares and 5,000 Brierley Investments Ltd shares. The plaintiff did so. The defendant has not paid the purchase price plus brokerage.

The issue between the parties is a purely factual one that can be simply stated. The plaintiff asserts that the contract to purchase the shares was to be "at best", i.e. to be at market prices ruling on the sharemarket on the day of purchase. The defendant claims that he instructed the plaintiff to purchase the shares only at, or below, a specified limited price in respect of each share. As the prices for each category of shares were above the limit he denies any liability under the contract.

Counsel are agreed that there are no legal issues involved. If the contract were as the plaintiff alleges the defendant is liable to pay the loss the plaintiff suffered. If the contract were as the defendant alleges the defendant is not liable to the plaintiff.

The parties have reached agreement as to quantum. It is accepted that there was a loss of $63,000, an amount which I understand is arrived at by taking the prices at which the plaintiff purchased the shares and deducting the prices at which the plaintiff subsequently sold the shares.

I now propose to review the evidence that bears on that factual issue.

I commence with the telephone discussion of 21 October 1987. That was the day after what became known as "Black Tuesday", i.e. the day when the sharemarket started to crash. There had been a dramatic fall in share prices. The defendant, who had previously purchased relatively small parcels of shares through the plaintiff, had been watching the events with interest. At that time a company owned by him, his wife and various family trusts had on deposit some $75,000. He decided actively to consider investing that amount in shares. After some preliminary discussions with others he that morning telephoned the plaintiff and after some considerable delay spoke to Mr White, a person with whom he had had dealings on only one previous occasion. There were discussions about the movements of the sharemarket particularly over the previous day, the extent to which there had been a recovery later in the day, and the prospects for the future. There appeared to have been a particular discussion about the likely prospects for Euro National. The outcome was that the plaintiff placed the orders to buy to which I have already referred.

As to the terms of that order there is a marked and vital difference in the evidence. Mr White says there was no discussion about any upper purchase price or limit to be paid. The defendant says that there was. He put it this way:

> "... I said to Mr White what sort of prices are we looking at for Euro National, he was of the opinion he could buy them for me under $2.20, doing a quick mental calculation I worked out 15,000 at $2.20 was going to be around the $33,000 mark, that was when I gave Mr White the instruction to buy, I said if you can buy under $2.20 certainly I'll take 15,000, we talked briefly at what Brierley opened up at and off hand I think it was somewhere around $3.45 to $3.50 in the morning's trading of which I placed a limit of $3.80 and also ordered $5,000 Chase at no more than $3.70."

It is the resolution of this conflict of evidence that will be decisive on whether the plaintiff is entitled to succeed in its claim.

Mr White in the course of the telephone conversation completed a buy instruction form in respect of each of the three shares. The forms record the date, which was 21 October, the time as 9.15, the defendant's name, his account number with the plaintiff and in each case the name of the shares and the quantity to be purchased. On the bottom right corner of the form there is a space where there is printed the word "limit" and also is printed:

"F = Fixed
P = Pref'd"

Mr White explained that it is in this part of the form that any limit to the price to be paid for the shares is noted. If it is to be a firm limit it would have the fixed notation. If it is to be a limit only slightly to be varied it would have the preferred notation. In each of the three forms this area has been left blank. It will be noted that the area does not provide for any notation where the purchase is to be "at best". Mr White said that if the area is left blank then it means that the purchase is to be "at best".

Shortly after the telephone conversation the defendant also made notes that were produced. They are on a single sheet of paper. They were obviously done with some care with a view to ensuring that the order he had placed was within the amount of cash that he had available. In respect of each of the three shares the note correctly records the name of the share and the amount ordered. Beside each of the shares there are prices in brackets that are as follows:

"Brierley (3.70 - 3.80)
Chase (3.60 - 3.70)
Euro National (2.0 - 2.20)"

The calculations that the defendant did as to the likely cost is in each case based on a price half-way between the prices in brackets, i.e. $3.75 for Brierley, $3.65 for Chase and $2.10 to Euro National. The total cost on those prices, including brokerage, was going to be a little over $70,000. It will be noted that the upper price in each case is the price that the defendant now says was the limit he specified.

The plaintiff purchased the shares. The sale notes were posted to the defendant that day. The prices at which the shares were purchased were:

Chase $3.85
Euro National $2.72 to $2.80
Brierley $3.90

In each case, therefore, the purchases were at prices above what the defendant now says was his limit, and above the range of prices that he noted at the time.

The defendant did not receive these sale notes for a few days as he was absent from Auckland. He received them on, or just before, 27 October. He says, and I accept, that he endeavoured to telephone Mr White without success. On that day he wrote to the plaintiff a letter in these terms:

> "WITH REFERENCE TO THE ATTACHED CONTRACT NOTES; ACCOUNT 587079
>
> I HAVE TRIED TWICE TO CONTACT MR JOHN WHITE BY TELEPHONE ON THE PRICES OF THE ATTACHED STOCK.
>
> I NOTE THAT ALL STOCKS ARE PURCHASED AT PRICES IN EXCESS OF OUR DISCUSSIONS ON THE PHONE. WITH PARTICULAR CONCERN IS THE PRICE OF THE EURONATIONAL SHARES WHICH MR WHITE TOLD ME HE WOULD BE ABLE TO BUY AT UNDER $2.20 PER SHARE WITH THE MARKET CLOSING AT $1.85 THE PREVIOUS DAY.
>
> I HEREWITH ENCLOSE THE SAID CONTRACT NOTES WITHIN THE TEN DAYS, STATING THAT THAT (sic) THIS STOCK WAS NEVER ORDERED, CERTAINLY AT THESE PRICES.
>
> FURTHERMORE AS DISCUSSED WITH MR WHITE I WISH TO POINT OUT THAT I STILL (sic) NOT RECEIVED THE OUTSTANDING SETTLEMENT DUE ON 44 BRIERLY (sic) SHARES, THAT WERE THE THE (sic) BALANCE OF 844 SOLD BY YOU. THE OUTSTANDING FIGURE IS $204.75."

Mr White says, and I accept, that that letter was never received by the plaintiff. But, in the end that may not be particularly material. What is significant is that I accept the defendant's evidence that he wrote the letter so that it sets out his reaction to the receipt of the sale notes on that day.

No payment for the shares having been received, on 11 November 1987 the plaintiff sent a statement showing the amount due $81,478.20. The defendant received that statement on 12 November. He immediately wrote to the plaintiff a letter in these terms.

> "ACCOUNT 587079
>
> WITH REFERENCE TO THE ATTACHED STATEMENT MAY I POINT OUT THE FOLLOWING ANOMOLIES (sic) WHICH I HAVE ALREADY HIGHLIGHTED IN A LETTER DATED 27 OCTOBER 1987.
>
> 1 / I HAVE STILL NOT RECEIVED A CHEQUE FOR $204.75 FOR THE BALANCE OF THE BRIERLY (sic) SHARES I SOLD.
>
> 2 / I HAVE NEVER PLACED ANY ORDERS FOR THE CHASE, BRIERLY (sic), OR EURONATIONAL SHARES YOU SENT ME ON 23/10/87.
>
> AS STATED IN MY LAST LETTER I STILL AWAIT YOUR CHEQUE FOR $204.75;, WHICH I TRUST I WILL RECEIVE WITHIN 7 DAYS."

I return to consider these letters in more detail later.

Mr White says that he made a number of endeavours to telephone the defendant but had some difficulty doing so. Finally, he reached the defendant on the telephone. It seems probable that this was on 23 November. Mr White said that the telephone conversation was before receipt of the letter of 12 November, but I do not think that to be so. Mr White said that the defendant denied placing instructions to buy the shares. Mr White disputed that and told the defendant that the plaintiff tape-recorded telephone conversations of this kind. He also said that if the defendant was in financial difficulties in paying the amount the plaintiff may be able to assist with finance. The defendant in his account of the conversation also said that there was a reference to the tapes and that Mr White claimed that there were no limits placed on the order, that the instructions were to buy "at best", and that it is all recorded on tape. The defendant said that he told Mr White that the matter was in the hands of his solicitor.

The defendant's solicitor was Mr O'Connor, a solicitor in practice in Tokoroa. Mr O'Connor in his evidence confirmed that on or about 23 November the defendant telephoned him concerning the transaction. He said that the defendant said that he, the defendant, had given Mr White clear instructions to buy certain parcels of shares at a price with a fixed maximum. Later on the same day there was a telephone discussion between Mr O'Connor and Mr White in which Mr White again claimed that there was a tape that could verify his account of the transaction. Mr O'Connor indicated that he would be in Auckland in a couple of days, that he would like to meet Mr O'Connor and that he would like particularly to either hear the tape or to see a transcript.

This meeting took place in Auckland on 25 November. Mr White handed to Mr O'Connor what he said was a transcript of the discussion between him and the defendant on 21 October. The transcript purports to be a record of a verbatim account of a telephone conversation, the concluding parts of which make it clear that the instructions from the defendant to the plaintiff was to buy the shares "at best". No limit or maximum price is referred to.

This transcript is a complete fabrication. The conversation was not taped. Mr White now acknowledges that he made up the transcript for the express purpose of using it to persuade the defendant, or his solicitor, that payment would have to be made. It was thus a deliberate, carefully-constructed fraud. For this deplorable action Mr White now tenders his apology. His only explanation is that he was driven to this dishonesty by the defendant's actions in denying liability to pay the amount due. The plaintiff did have machinery for the taping of telephone conversations, but that machinery on the relevant day was not yet in operation.

The defendant having taken no further steps following this meeting the plaintiff's solicitors wrote to the defendant's solicitors. The letter bears date, 4 December, but it seems that it was not sent until 7 December. It reads:

"We act for the abovenamed company, Jordan Sandman Smythe Limited.

We note that your Mr O'Connor has failed to return the telephone message left by our Mr Black on the 30th November 1987 with respect to the refusal of payment of shares by your client, Mr McKittrick.

We record that your client purports to deny having entered into a contract with our client to purchase shares namely, 15,000 Euro-National Corporation Limited, 5,000 Chase Corporation and 5,000 Brierley Investment Limited shares. Advance has already been sent to your client by demand, dated 11 November 1987, claiming payment of $81,478.20 in payment of the said shares.

We can only take Mr McKittrick's denial and your failure to respond to our telephone message as a repudiation of the contract and we accordingly cancel that contract.

Our client will take immediate steps to mitigate its loss by selling the shares forthwith. Summary judgment proceedings will be issued shortly.

Yours faithfully,
RUDD WATTS & STONE

C.E. Bell
da:45

REGISTERED
c.c. Mr J. McKittrick
252 Whangaparaoa Road
Whangaparaoa
North Auckland"

The letter refers to an effort by Mr Black, a principal of the plaintiff's solicitors, to telephone Mr O'Connor. I need not go into any detail about that. Shortly after the letter there was a telephone discussion between Mr Black and Mr O'Connor. Both gave evidence of this telephone discussion. I find that the conversation was dominated by Mr Black and that other than making some enquiries concerning the tape Mr O'Connor listened to what Mr Black had to say. I also find that Mr Black spoke to Mr O'Connor in a somewhat aggressive fashion. In response to Mr O'Connor's enquiry about the tape Mr Black said he replied by saying that he couldn't see why Mr O'Connor would want to know about the tape if his client denied having contracted for the shares, and, further, that the tape would be relevant to the issue of discovery in subsequent proceedings. He said that he knew that there was in fact no tape, but he did not say one way or the other concerning its existence.

Mr Black's actions reflect little credit on him. He knew that Mr White had represented that the conversation had been taped and he knew that that was false. In my view, as a matter of proper professional integrity, when the matter was raised directly by the defendant's solicitor Mr Black ought to have told Mr O'Connor that there was no tape, rather than deliberately setting out to deceive Mr O'Connor into believing that there was.

The plaintiff then commenced proceedings by way of summary judgment. There were problems over service on the defendant. At one stage when the process server approached the defendant the defendant deliberately misled the process server as to his identity. The defendant acknowledges that he sought deliberately to mislead the process server, and for that he also now apologises. The process server, Mr Ranstead, said that when he finally served a person he identified as the defendant the defendant claimed that he was some other person. The defendant denies that he was ever served and claims that the papers were served on this other person. No procedural issue is taken as to the service. The defendant explains his actions by stating that he was advised by his solicitor that because of the imminence of the Christmas vacation, and the difficulty of instructing counsel during it, it would be better to avoid service until January of the following year.

The application for summary judgment was opposed. It finally came before Master Gambrill on 2 May 1988 when it was dismissed.

It is on these facts then that I am called upon to determine the crucial evidential conflict between Mr White and the defendant.

In view of Mr White's action relating to the alleged transcript of the tape-recording, to which I have already referred, I treat his evidence with considerable caution. Indeed a person prepared to act as dishonestly as he did is not to be believed unless there is independent and convincing corroborative evidence of what he says.

I do not place any significant reliance on the plaintiff's claims that the defendant deliberately avoided meeting his obligations. More particularly I do not place any reliance on the defendant's attempts to avoid service of the proceedings, although his action in deliberately misleading the process server does, at least to some extent, reflect on his credibility. Subject only to that I considered that the defendant was honestly trying to state what he believed had occurred.

Nor do I place any significant reliance on the discussions between Mr White and Mr O'Connor, or between Mr Black and Mr O'Connor. By that stage the respective parties had adopted their various stances, although it does appear that in these conversations Mr O'Connor may not have asserted firmly the attitude that the defendant now adopts.

Faced then with this clear conflict of oral evidence I turn to what appears to me to be the crucial documentation. It falls into three categories.

First, there are the buy instruction forms that Mr White completed while he was talking on the telephone with the defendant on 21 October 1987. As I have indicated the space where any limit on purchase price would be expected to be noted is left blank. However, this cannot be regarded as decisive. The possibility remains that, particularly at the time of hectic activity on the sharemarket generally, Mr White may simply have failed to note the specified limits on the forms.

Secondly, there are the defendant's notes. These I consider are more significant. The defendant was, as I have indicated, calculating his likely exposure. If, as he now says, he had clearly specified firm price limits that were not to be exceeded it is surprising that he did not note them in his calculations. One would rather have expected that in calculating the amount for which he could be liable he would have based that calculation on those limits. He did not do so. Not only did he not note a limit, but rather he expressed the likely prices as in each case a range. This is consistent with his having discussed with Mr White the likely price. But it is not, in my view, consistent with a clearly specified limit.

Thirdly, there are the letters of 27 October and 12 November.

Of the former the second and third paragraphs are significant. In the third paragraph he states categorically that the stock "was never ordered certainly at these prices". In the second paragraph he refers to the stock being purchased at prices "in excess of our discussions on the phone". He goes onto refer to the Euro National shares which he said Mr White told him "he would be able to buy at under $2.20 per share".

I bear in mind that this letter was not written with the sort of legal precision that one would expect from a trained lawyer. But, for all that, it is surprising that if, as the defendant now says, there were in each case clear and firm price limits that the defendant did not say so. In my view the letter is more consistent with a person who is disappointed at the prices at which the shares were bought because they were more than had been discussed. But a discussion as to prices is not the same as a clear and firm limit. Even in respect of the Euro National shares he does not say that the purchase price was above the figure he had specified. He refers only to the price at which Mr White thought he would "be able" to buy the shares.

The plaintiff placed reliance particularly on the second paragraph of the letter of 12 November where the defendant said that he had "never placed any orders for the Chase, Brierley or Euro National shares you sent me on 23/10/87". Taken on its own this statement is clearly not correct. Even on the defendant's account he did place orders for these shares. But I do not think that this statement should be taken on its own. The letter in the opening paragraph refers to anomalies which the defendant said he had already highlighted in his letter of 27 October. I have accepted that the plaintiff did not receive this letter. But having regard to this comment the letter of 12 November must be read in conjunction with the letter of 27 October, and so read it is clear that paragraph 2 of the letter of 12 November should not be taken at its face value.

Having considered this documentation, all of which came into existence either during or a very short time after the crucial telephone conversation, I am driven to the conclusion that the defendant is not correct when he now asserts that in the conversation of the 21st October 1987, he made it clear that the limits he now claims were to apply. I do not consider that the defendant is seeking deliberately to mislead the court in his evidence. But when regard is had to the documentation, I conclude that the concept of limits being placed

developed in his mind only after the event and has since done so to the extent that he is now convinced that he did express these limits.

But I am not satisfied that he did. It follows, therefore, that if no express limits were imposed then the shares were to be purchased at current market prices, or, as the plaintiff puts it, "at best".

It follows from this conclusion that the plaintiff is entitled to judgment against the defendant in the sum of $60,000.

The plaintiff also claims interest pursuant to s87 of the Judicature Act 1908. That section empowers the court "if it thinks fit" to order that there should be included in the sum for which judgment is given, interest at not exceeding the prescribed rate.

In the normal course a successful plaintiff is entitled to costs either according to scale or as fixed by the court. That award of costs is also at the discretion of the court.

In this case I exercise my discretion against the plaintiff and decline the claim for interest and make no order as to costs. I do so in order to emphasise the serious view that the court takes of the actions of Mr White as an employee of the plaintiff in deliberately and dishonestly fabricating a document for the express purpose of persuading the defendant, or his legal advisers, to make payment of the amount that the plaintiff claims.

Solicitors for Plaintiff: Rudd Watts & Stone (Auckland)
Solicitors for Defendant: Hassall Gordon O'Connor (Tokoroa)