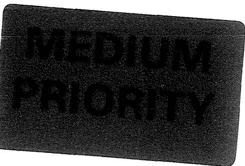
1411

M.Z.L.R

CP 93/88



IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

BETWEEN GENERAL CARRIERS LIMITED
Appellant

A

AND DOMTRAC EQUIPMENT LIMITED
Respondent

Hearing: 7 September, 21 November 1990

Counsel: L.H. Atkins Q.C. for the Appellant
M.B. Ryan for the Respondent

Judgment: 10th January 91

JUDGMENT OF HERON J.

This is an appeal against a decision of Judge Ryan given in the District Court at Palmerston North on 27 January 1988 after a defended hearing on 4 December 1987. Claiming the sum of $13,431.79 for repairs done to the defendant's (appellant's) vehicles the plaintiff (respondent) obtained judgment for the full amount.

By consent, proceedings were brought in the District Court for $13,431.79 on 17 December 1984. A full statement of defence was filed on 13 June 1985. Discovery was given on 3 September 1985 by the defendant, and on 23 October 1985 by the plaintiff. The matter continued its leisurely path until 4 December 1987 when the matter was finally heard.

Two points arise for consideration on this appeal. The first is whether the District Court Judge was right in holding there was sufficient evidence to establish that the work was performed. The account comprised labour and materials in respect of certain trucks belonging to the business of the appellant. There was no proof of the actual work done presumably by the persons who carried out the work. The Judge

said:

> "There was no specific challenge by the defendant to the details of any individual invoice. Nor to the subtotals and totals claimed as owing in respect of each or all of them. It is convenient to deal at this stage with the somewhat surprising submission made for the defendant in answer to the claim, which was that notwithstanding the production of the several invoices by the plaintiff's witnesses and references by those witnesses as to how the invoices were made up and generally came into being none of those witnesses in fact deposed that the work in respect of which the claim is made was actually carried out. I have not found it necessary to call for a transcript of the evidence which was recorded on tape but believe it is correct that none of the plaintiff's witnesses did specifically say that the work detailed on the invoices was in fact done. I have not the slightest doubt what each or all of those witnesses would have said had they been asked such a question."

The Judge said on the balance of probabilities that the only inference to be drawn was that the work had been done. I agree with him, but the matter is really concluded by the pleadings. In the statement of claim the plaintiff alleged:

> "3. That during November and December 1983 repairs were carried out by the plaintiff to several trucks owned by the defendant at the request of the defendant.
>
> 4. That the total cost of those repairs amounted to $13,431.79 full particulars of which have been supplied to the defendant."

The defendant said in answer to that allegation:

> "That it admits that during November and December 1983 repairs were carried out by the plaintiff to several trucks but save as is herein expressly admitted the defendant denies each and every allegation in paragraph 3 of the statement of claim and specifically denies that the said trucks were owned by the defendant or that such repairs were carried out at the request of the defendant or both and says that if it be proved that during November and December 1983 repairs were carried out by the plaintiff to several trucks owned by the defendant at the request of the defendant (all of which is denied) then the liability for those repairs was the liability of Scotts Freightlines Ltd (in liquidation) a duly incorporated company having its

> registered office at Palmerston North, or of Phillip Scott or of any other company controlled by the said Phillip Scott."

Cross examination was directed to the question of who authorised the work. The conduct of the case, the pleadings and confirmation by officers of the company that the rendered invoices were for the work actually done, given they did not carry out the work themselves, in my view create more than sufficient proof on the probabilities that the work was done.

The defendant is also estopped by the pleadings from relying on this point if there was anything in it.

The second point in this appeal is whether the account is the responsibility of General Carriers Ltd or the purchaser of the business. The work was done in November 1983. The plaintiff had been doing work for the defendant for three years or more. The course of business was that the manager of the defendant company, Mr Murray Pinfold, would generally commission the work to be done on the trucks and when the work was completed and the invoice prepared it would be sent to Mr Pinfold at the address of the defendants. To the knowledge of the plaintiffs the accounts were then authorised by Mr Donald Pinfold, the father of Murray Pinfold, and this would sometimes involve accounts being sent to the latter's business address, namely Pinfolds Electrical. Sometimes work was ordered to be done by individual drivers employed by the defendant, but generally authorised by Mr Murray Pinfold. Whilst some of the invoices do not appear to have authorising signatures on them, as was the general requirement of the plaintiff, the course of business conduct required him to be aware of what had been done. If there were to be instructions about work on the trucks they would come from him.

Late in January 1984 it became common knowledge that the defendant's business had been sold to Scott Freightlines Ltd and consequently further work carried out was invoiced to them. The plaintiff knew by then that Scott Freightlines Ltd

were operating the former General Carriers vehicles. They acknowledged this fact by opening an account in the name of the new company on 7 February 1984.

Mr Ramsay, for the plaintiff company, said as to his knowledge of the sale of the business:

> "During the October November period we became aware of Scott Freightlines preparing ... were going to take over General Carriers. During that time on a couple of occasions I would have contacted Mr Pinfold to try and ascertain what the position was. Because we needed to know obviously who were going to be responsible for paying of the account. During the November December period prior to final ... finance could not be completed by Scott Freightlines and there was a delaying situation until Scott Freightlines sorted out their finances.
>
> And where did that information come from as far as you were concerned?
>
> I cannot recall at this stage but it would have perhaps been from the drivers, through the workshop. I just don't know, its one of those things you hear and you have got to follow it through to find out.
>
> Can you recall any specific occasion when this was discussed with a representative from General Carriers or Scott Freigtlines or someone else?
>
> Yes. I can. In early January 1984 I went round to Grey Street where General Carriers operated their business from, from the depot, and spoke to Mr Murray Pinfold with regard to what was happening. He advised me that ... at that stage I must have become aware that perhaps the deal with Scott Freightlines had gone through in mid December, late December, and that they had purchased the business from Mr Pinfold. I was concerned that I had heard that the purchase date had been backdated to 1 October because that would bring them into the category of who was going to pay the account into a different organisation. In early January when I spoke with Mr Pinfold he assured me that should Scott Freightlines not be able to meet the accounts "his old man" to use his phrase, I think his phrase was "his old man" would pick up the tab."

In cross examination he accepted that the information came to him informally. He thought the date of settlement had been changed on a number of occasions. There is some confirmation

of this uncertainty when one looks at the documentation. Initially an informal agreement was entered into dated 20 October 1983 calling for settlement on 1 November 1983. Then a formal agreement dated 25 November 1983 was executed, referring to the settlement date as being 1 November 1983 but also providing that the landlord's consent was required by 15 December 1983. The settlement provision in the contract provided:

> "Settlement shall be deemed to have taken place on the first day of November 1983 on which date the purchaser shall have taken possession of the vehicles referred to in the first schedule hereto and the business operated by General Carriers Ltd."

Naturally none of this documentation was made available to the plaintiff and the evidence was that they received only second hand information about it and no information about the actual date of settlement. It could well have been that the defendants actually owned the business after 1 November, in the sense that any agreement was still conditional or in any event not yet completed, but that on completion it was backdated to 1 November. I think the silent evidence revealed in the documentation is consistent with the plaintiff's view that the cutoff date was at that period in any event a matter of some uncertainty. Mr Ramsay was not prepared to accept that the cutoff point was 1 November 1983. He said:

> "My understanding is that they ... the business was complete and sold mid December 1983. It may have been taken over ... the actual business carried on to mid December or somewhere round there.
>
> Well do I take it then that you do not accept what the documents tell you, namely that the takeover was at 1 November 1983?
>
> I haven't seen the documents."

Indeed Mr Latham said that when speaking to Mr Murray Pinfold he was told that there were problems with finance. He did not consult the principal shareholder and director Mr Donald Pinfold but it would seem to be a perfectly proper inquiry of

the manager of the company to ascertain when ownership was being transferred. The plaintiff is also able to point to an occasion when the purchasers approached him to obtain a credit account which was well after 1 November. Undoubtedly the plaintiffs attempted to recover the account from the purchasers of the business. In my view they were interested only in having the account paid, and if it could be paid by the purchasers and was in fact their responsibility, then it would be of no concern provided the account was paid. The point is however, that at the time the accounts were incurred the plaintiff had reason to believe that the business which the plaintiff had been serving for some years continued in operation with the same persons in charge. Mr Lagah, the plaintiff's acting service manager at the time, gave evidence as to the accounts but described how the repairs which they carried out were authorised. He said:

> "How were jobs opened?
>
> Along the same lines. We were notified either by Murray who would contact us or one of their drivers would contact us. As long as we got a name. Occasionally Mr Don Pinfold would ring us up, or we would try to get in touch with Mr Pinfold on some occasions, mostly with Murray. Murray was the person we were dealing with most of the time."

Mr Lagah, in speaking of the change of ownership of the business, said:

> "What did you know of any change in the owner of the business of General Carriers?
>
> We heard some grumblings or ... there was always a grapevine situation everywhere.
>
> Whether it is true or false you don't know?
>
> About November December, can't remember which, around about that period of time we heard there was ... Scott ... I thought it was Scott Brothers but it turned out to be Phillip Scott was going to take over things or merge or something like that with General Carriers, that's about as far as it went."

He confirms that he received no formal information as to the changeover of the business.

Mr Donald Pinfold gave evidence confirming the contracts I have just referred to and said the purchaser took over on that date. He said:

> "Prior to 1 November 1983 in what capacity did Mr Murray Pinfold work for you?
>
> He was running the place round there for me.
>
> As manager of General Carriers?
>
> He only done that after Mr Adams moved.
>
> How long had he been managing General Carriers for you?
>
> I just couldn't tell you when Mr Adams left.
>
> Do you know if your son remained working at General Carriers after 1 November 1983?
>
> He did.
>
> Did Mr Scott say anything to you about keeping him on?
>
> When we had our meeting at the office he told me that he may employ Murray. He didn't specifically say that he was going to when I signed that document.
>
> Did General Carriers Ltd pay all General Carrier's debts up to 1 November 1983?
>
> To my knowledge yes."

Mr Pinfold confirms that the balance owing under the agreement for sale and purchase was never paid, and he recovered only the deposit and proved as a creditor for the balance of the monies. He confirmed that he had never told the plaintiff about the takeover. He acknowledged that the purchaser was to buy the business of General Carriers Ltd, possibly by purchasing the shareholding. He also agreed that there was a delay after 1 November and that is recorded in this exchange:

> "Now the fact that the solicitor's agreement wasn't signed until 25 November suggests that there was a bit

of a delay in getting the paperwork done because that was almost a month ... more than a month after you and he had signed your agreement?

There was a delay problem yes. I don't know why the delay was at this stage. I wouldn't have been particularly worried because I had already signed one.

At the suggestion of your solicitors you signed another one, that's the 25 November one, is that correct?

That's that there? Yes.

And would it be fair to say it was some time after that before things got tidied up as far as solicitors were concerned?

No I wouldn't say that at all.

Would you agree or disagree with the suggestion if you say that you didn't know that Scott Freightlines was incorporated in December 1983?

I didn't know that."

Mr Murray Pinfold confirmed that he was the manager of the business. He continued as manager for a business which he described as "General Carriers" but that he was doing that for the purchaser Mr Scott. He said:

"Did you carry on with the same kind of work after 1 November and 31 November? The same office staff?

Two of us were the same, but Phillip Scott, sort of hired one good looking bird, and then didn't like here, because she wouldn't play ball, so he would hire another one, sort of thing, so, he went through the system."

He said he was unaware that any letter had been sent to customers advising of the changeover and finally this passage in the evidence:

"Would it be fair to say, that generally speaking, things carried on as they had before, and by before, I mean before and after 1 November?

Yes.

I think that General Carriers had an arrangement with Domtrac whereby they would service the trucks as soon

> as possible because of the contracts you had commitments towards?
>
> Yes.
>
> Not only that but there was some sort of official arrangement that they would work overtime or whatever was necessary to get the trucks back on the road?"

It is plain from the evidence that the business operated by General Carriers Limited carried on, but the ownership changed. It is a matter of considerable doubt as to whether at the time the work was authorised the legal formalities had been completed, but even if they were in the plaintiff's mind it was continuing to provide the same service on the same terms to the same business, whatever its proprietorship. Accordingly in law we have a situation where the company is dealing with an agent held out as having authority, and indeed having authority to commit the defendant up to 1 November 1983, but not thereafter. No satisfactory notification of the change of ownership was given, the plaintiffs being left to find out that information for themselves. The matter was entirely unbusinesslike. Naturally the plaintiff looks to the defendant to meet the accounts because it was deprived of any opportunity of considering whether it would extend credit to some other company.

This is a case where there is no actual authority, either express or implied, and the plaintiff must then rely on the doctrine of ostensible authority. Mr Atkins' point is that Mr Murray Pinfold continued working but for a different principal, and made the commitment to that principal where the plaintiff ought to have been on notice of the change. The evidence does not support a conclusion that adequate notice was given. It seems to me that the Judge was right in finding that there was not sufficient communication to put the plaintiff on notice. The plaintiff was unaware that the very same manager would continue operating the business and I think it is likely they would have associated a change of manager with a change in business. That situation continued in a fashion which in my

view constituted a holding out by the company known as General Carriers Ltd that its business continued as before, whereas in fact the business had been sold and the commitments entered into by its former manager were on behalf of a different principal altogether.

In Saville v Chase Holdings (Wellington Ltd [1989] 1 NZLR 294, 304 McMullin J said on the topic of ostensible authority:

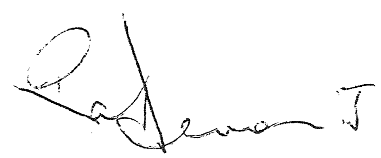
> "The locus classicus on the subject is the judgment of Diplock LJ in Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480 at p.503:
>
> > "An 'apparent' or 'ostensible' authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted pon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract."
>
> A further useful statement of principle is to be found in the speech of Lord Keith of Kinkel in Armages Ltd v Mundogas SA [1986] AC 717 at p.777:
>
> > "Ostensible general authority may also arise where the agent has had a course of dealing with a particular contractor and the principal has acquiesced in this course of dealing and honoured transactions arising out of it. Ostensible general authority can, however, never arise where the contractor knows that the agent's authority is limited so as to exclude entering into transactions

> of the type in question, and so cannot have relied on any contrary representation by the principal: Russo-Chinese Bank v Li Yau Sam [1910] AC 174."
>
> To the same effect is the judgment of this Court in New Zealand Tenancy Bonds Ltd v Mooney [1986] 1 NZLR 280 at p.283 where the essence of the doctrine of ostensible authority was stressed - it is the principal's representation that creates the authority; not the agent's assertion that he has that authority."

In the present case, the system operated by Mr Donald Pinfold over a long period of time, creating as it did the ostensible authority of Mr Murray Pinfold who was allowed to request the plaintiff's services, prevents him on behalf of the defendant from now denying any such authority after the sale of the business.

In law the appellant is estopped from asserting the true factual position by virtue of the conduct I have just described.

The appeal must be dismissed. The respondent is entitled to costs which I will fix if necessary after receiving memoranda.



Solicitors

Wadham Goodman, Palmerston North for the Appellant
M.B. Ryan, Solicitor, Palmerston North for the Respondent