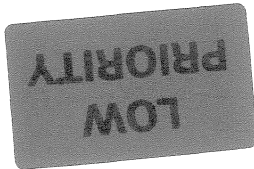


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NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

HC.147/97



BETWEEN

ELITUNNEL MERCHANTING
LIMITED and PAYLESS SHOES
LIMITED

Appellants

AND

THE REGIONAL COLLECTOR
OF CUSTOMS (NORTHERN)

Respondent

Hearing: 29, 30 October 1998

Counsel: R. B. Stewart for Appellants
M. J. Ruffin for Respondent

Judgment: 20th November 1998

JUDGMENT OF SALMON, J.

Solicitors: Mark Sisam, P.O. Box 21079, Henderson, Auckland for Appellant
Crown Solicitor, DX CP24063, Upper Shortland Street, Auckland.

This is an appeal pursuant to s.140A of the Customs Act 1966 ("the Act") against a decision of the Collector of Customs (Northern Region) dated 15 September 1997. The Collector of Customs made determinations pursuant to s.140(1) of the Act. That subsection provides as follows:

"140. Determination of Customs value by Collector - (1) The Customs value of goods pursuant to section 5 of the Tariff Act 1988 and the Ninth Schedule to this Act shall be determined by the Collector and duty shall be payable in accordance with that determination unless, pursuant to this Act, a different amount is proved to be the correct Customs value of the goods."

Pursuant to subs.(3) of s.140 the importer, Elitunnel, and another company, Payless Shoes Ltd, objected to the value determined by the Collector. The Collector considered and rejected the objections. This appeal followed that rejection.

Section 140A of the Customs Act 1966 provides:

"140A. Review by High Court of determination - (1) If any importer is dissatisfied with the Collector's decision in respect of his objection under section 140(3) of this Act against a determination, he may appeal to the High Court against that determination.

(2) Every such appeal shall be made by giving notice of appeal within 28 days after the date on which the appellant was notified in writing under section 140(5) of this Act of the decision or within such further time as the Court may allow an application made either before or after the expiration of those 28 days.

(3) In its determination of any appeal, the Court may confirm or modify the determination appealed against.

(4) The procedure in respect of any such appeal shall be in accordance with the rules of the Court, and in default of such rules, or so far as they do not extend, then in accordance with the usual practice of the High Court in civil proceedings so far as applicable or, so far as not applicable, then in accordance with the directions of the Court or a Judge thereof.

(5) Notwithstanding anything in this Act, where in the course of determining any appeal, it becomes necessary to delay the final determination of such appeal, the appellant shall nevertheless be given delivery of his goods from Customs control subject to the Collector receiving such security as he thinks sufficient to cover the full amount of duty."

It is common ground that the approach to be taken on such an appeal is that set out by Davison, C.J. in *EMI Manufacturing (N.Z.) Ltd v Collector of Customs* [1984] 2 NZLR 326 at 342:

“On such an appeal the Court considers the materials which were before the body or tribunal appealed from and the additional materials if any before the Court itself and then makes up its own mind carefully weighing and considering the decision appealed against and reversing it if on full consideration it comes to the conclusion the decision was wrong.”

As already mentioned the original objection was lodged in the names of the two appellants. Counsel have agreed, however, that I need make no determination in relation to Payless. The appeal by Payless is adjourned for further argument, if that is necessary in the light of the decision relating to Elitunnel.

The appeal is concerned with a commission which Elitunnel paid to an Australian entity, Desert Storm Management Pty Ltd trading as Custom Originals (“Custom Originals”), in connection with the importation of Caterpillar footwear which was manufactured in Asia. The issue for determination is whether or not Custom Originals was a buying agent for Elitunnel and whether what was described as a commission paid by the appellant to Custom Originals was a commission payable in terms of that agency. If Custom Originals was a buying agent for the appellant and if the payments described as a commission were made in terms of that agency then the appeal will succeed.

The commission consisted of several components so that a possible outcome is that the appellant could succeed in relation to part of the commission.

Background Facts

In 1993 the global distribution of Caterpillar footwear was jointly controlled by entities known as Cadco and Jerryco who were licensed by Caterpillar Inc. of the United States. The appellant wished to obtain the licence to sell Caterpillar footwear in New Zealand. Custom Originals wished to secure the exclusive Australian rights. The outcome was that Custom Originals was given the exclusive licence for Australia and New Zealand and in turn appointed the appellant as exclusive New Zealand licensee for Mack and Caterpillar footwear as from 18 January 1993.

On or about 31 December 1993 Caterpillar Inc. terminated the licence with Cadco/Jerryco and gave the control of global distribution of Caterpillar footwear to Wolverine Worldwide Inc. ("Wolverine"). With effect from 31 December 1993 Wolverine entered into a Distribution and Licence Agreement ("the agreement") by which Custom Originals was appointed as the distributor of Caterpillar footwear in Australia and New Zealand. Apparently the arrangement between Custom Originals and the appellant continued as previously, despite the provisions of section 21.2 of the agreement which prohibited assignment of the distributor's rights and duties under the agreement without the prior written consent of Wolverine.

The agreement provides that the distributor (Custom Originals) shall purchase all products from one or more authorised manufacturers. Wolverine selected and notified the distributor of the authorised manufacturers. Section 8.2 of the agreement provided that:

"Although Distributor shall purchase all Products directly from an Authorised Manufacturer and although each purchase order shall be made out to an Authorised Manufacturer, Distributor shall send or deliver each purchase order to Wolverine for Wolverine's review and approval. If Wolverine approves the purchase order, it shall send or deliver it to the Authorised Manufacturer."

As already indicated, the authorised manufacturers were in Asia.

The agreement also provided for Custom Originals to pay to Wolverine an amount equal to 15 per cent of the first cost of the product. The first cost of the product was 105 per cent of the factory cost. Of that 15 per cent, five per cent was paid as a royalty to Caterpillar and the other 10 per cent was retained by Wolverine.

The appellant was unaware of the terms of the distribution and licence agreement throughout the time of its arrangement with Custom Originals. During the course of the investigation by the respondent, inquiries were made of Wolverine as to their understanding of the relationship of the appellant to Wolverine. Wolverine's response to the respondent's inquiry was:

"There is no agreement between WWW and Elitunnel Merchating Ltd. As I understand, Elitunnel Merchating Ltd is a customer in the New Zealand market. All sales under the agreement with Custom Originals were reported as combined

purchases for both markets. Therefore WWW is not in possession of sales reports specific to the New Zealand market - or Elitunnel Merchancing Ltd. Any such sales were conveyed verbally by John McNickle or a representative of Custom Originals. In regards to s.21.2 of the agreement between WWW and Custom Originals, WWW has not assigned distributor rights to Elitunnel Merchancing Ltd. Again, Elitunnel Merchancing Ltd is a customer of Custom Originals in the New Zealand market. The scope of our involvement with the company principal, Colin Ross Allen is limited to the above mentioned."

The arrangement between the appellant and Custom Originals is clear from the evidence made available to the Court. The appellant and Custom Originals would confer from time to time as to the product suitable for the New Zealand market. To assist in the decision making process the appellant had available to it line drawings of the available product provided by Wolverine and information as to the factory cost of the product. The Asian factories required that the minimum order should be 600 pairs of any particular item. This was far more than was needed for the New Zealand market so that it was necessary for New Zealand orders to be "piggy backed" onto orders from Australia. It was only if the combined orders met the minimum that a particular shoe could be ordered. All the appellant's orders were placed with Custom Originals. Custom Originals invoiced the appellant. The combined order then followed the procedure required by the distribution agreement.

Initially, the appellant's order combined with that of Custom Originals was delivered to Australia. The appellant's order was then separated out of the combined order and shipped to New Zealand. For reasons of convenience to Custom Originals, that procedure was changed and the New Zealand component was, at least in some instances, shipped

direct from Asia to New Zealand. There were occasions when the appellant purchased footwear directly out of stock held by Custom Originals in Australia. Whichever method of supply was used the payment arrangement was essentially the same. Custom Originals invoiced the appellant for the factory price of the shoes. In a separate invoice Custom Originals charged the appellant a commission of first 26 per cent and later 31 per cent of the factory price. If the goods had been sent to Australia or were purchased out of stock Custom Originals would invoice the appellant for a pro rata proportion of freight and insurance costs incurred. For goods shipped direct from Asia to New Zealand and in the case of goods shipped from Australia to New Zealand the appellant paid its own freight and insurance costs.

Originally the commission was invoiced as "royalty/commission". Later as a result of a request from the appellant the payment was described as "styling and buying charges".

The determination of the Collector pursuant to subs.(1) of s.140 of the Customs Act 1966 included the whole of the commission in the Customs value of the goods. The appellant's objection sought to have the whole of the commission deleted from that value. The decision of the Collector on that objection recited a number of the facts set out above and concluded that:

"... the relationship between Elitunnel and Custom Originals was properly that of buyer/seller and all payments made to Custom Originals, including reimbursement of freight costs incurred by them in sourcing footwear sold to New Zealand, properly forms part of the Customs value of the goods."

Consequently 55 claims for revenue totalling \$290,706.05 were submitted to the appellant for payment.

Valuation of Goods for the Purposes of the Customs Tariff

The Ninth Schedule to the Act sets out the basis upon which goods will be valued for the purposes of the Customs Tariff. Clause 2 of that Schedule provides that the transaction value will be the primary basis of valuation. The relevant parts of clause 2 provide:

- "2. Transaction value as primary basis of valuation - (1) The Customs value of imported goods shall be their transaction value, that is, the price paid or payable for the goods when sold for export to New Zealand, adjusted in accordance with clause 3 of this Schedule, if -
- (a) ...
 - (b) ...
 - (c) Where any part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer is to accrue, directly or indirectly, to the seller, the price paid or payable for the goods includes the value of that part of the proceeds or can be adjusted in accordance with clause 3 of this Schedule; or
 - (d) ..."

Clause 1 of the Ninth Schedule defines "price paid or payable" as:

"[I]n relation to any goods, means the aggregate of all amounts paid or payable by the buyer to or for the benefit of the seller in respect of the goods."

Clause 3 is particularly relevant to a determination of these proceedings. In so far as it is applicable to this case it provides:

- "3. Adjustment of price paid or payable -
- (1) In determining the transaction value of goods under clause 2 of this Schedule, the price paid or payable for the goods shall be adjusted -
 - (a) By adding thereto amounts, to the extent that each such amount is not otherwise included in the price paid or payable for the goods and is determined on the basis of sufficient information, equal to -
 - (i) Commissions and brokerage in respect of the goods incurred by the buyer, other than fees paid or payable by the buyer to his agent for the

- service of representing him overseas in respect of the purchase of the goods; and
- (ii) ...
 - (iii) ...
 - (iv) Royalties and licence fees, including payments for patents, trademarks, and copyrights in respect of the imported goods that the buyer must pay, directly or indirectly, as a condition of the sale of the goods for export to New Zealand, exclusive of charges for the right to reproduce the imported goods in New Zealand; and
 - (v) The value of any part of the proceeds of any subsequent resale, disposal, or use of the goods by the buyer that accrues or is to accrue, directly or indirectly, to the seller; and
 - (vi) The costs of transportation and insurance of, and the loading, unloading and handling charges, and other charges and expenses associated with the transportation of, the imported goods until the goods have left the country of export, if such costs, charges and expenses are paid or payable by the buyer, directly or indirectly, to or for the benefit of the seller as a condition of the transaction;
- (b) ..."

It will be seen that commissions and brokerage are to be added to the price paid to the goods unless they constitute "fees paid or payable by the buyer to his agent for the service of representing him overseas in respect of the purchase of the goods".

It will be seen too that there is specific provision for the addition of royalties to the price paid.

The essential issue in this case is whether the commission is covered by the exception for fees set out above. Mr Stewart conceded that the royalty paid to Caterpillar could not be excluded from the transaction value and he also conceded that in respect of goods purchased ex Custom Originals' stock in Australia, it could not be said that the commission charged represented a fee "paid or payable by the buyer to his agent for the service of representing him overseas in respect of the purchase of the goods". The question for determination may, therefore, be further refined as

being whether the commission paid on goods which came from Asia to the appellant either directly or via Australia, was paid to Custom Originals in Custom Originals' capacity as an agent for the service of representing the appellant overseas in respect of those purchases.

In considering that issue it is possible to distinguish between that part of the commission which was paid by Custom Originals to Wolverine pursuant to the provisions of the distribution agreement and that part which was retained by Custom Originals.

In construing the valuation provisions of the Ninth Schedule it is important to bear in mind that the apparent intention of those provisions is to ascertain the true cost of the goods to the importer - *Adidas New Zealand v The Collector of Customs* (CA.29/98 13 October 1998 at p.8).

The Payment to Wolverine

Even if it were to be held that Custom Originals was the appellant's agent, I am satisfied that the payment made to Wolverine cannot be described as being for the service of representing the appellant overseas in respect of the purchase of the goods. The payment to Wolverine was, of course, an obligation of Custom Originals pursuant to its distribution agreement with Wolverine. Wolverine cannot possibly be described as an agent of the appellant. In a letter to the respondent Wolverine described their service fee of 15 per cent on first cost value, or 15.75 per cent on

factory cost, as being in part the royalty payable to Caterpillar Inc. with the remainder providing for the selling, marketing and administrative expenses of Wolverine.

Indeed, in my view the total payment to Wolverine is caught by sub-paragraph (iv) of Clause 3(1)(a) of the Ninth Schedule. It constitutes royalties and licence fees in respect of the imported goods that the buyer must pay directly or indirectly as a condition of the sale of the goods for export to New Zealand. As the Court of Appeal held in *Adidas* at pp.7-8:

“For the purposes of cl.3(1)(a)(iv) the sale must be the transaction or process under which the importer obtains the product. It is therefore the true nature of that transaction as evidenced by the relevant documentation which falls for consideration.”

I am satisfied, therefore, that the whole of the payment to Wolverine must be included in the transaction value.

That leaves the question of the commission retained by Custom Originals.

The Commission Retained by Custom Originals

As Mr Stewart for the appellant said, the issue to be determined is whether or not Custom Originals was a buying agent for the appellant and if it was, whether the payment by the appellant to Custom Originals was a commission paid in terms of that agency. Mr Stewart submitted, and I accept, that whether or not the payments made to Custom Originals were

buying commissions, is a question of fact to be determined on all the facts and circumstances pertaining to the transactions and the relationship of all the parties involved. No one fact or circumstance can be determinative of the issue.

Counsel have not been able to find any New Zealand decision which helps to determine these questions. There are, however, decisions in the United States which are of assistance and there are relevant commentaries resulting from consideration at an international level of the issues that arise in this case. I have derived assistance from *Customs Valuation: Commentary on the GATT Customs Valuation Code* (1988) by Saul Sherman and Hirich Glashoff. Those authors describe a rationale for the exclusion of fees paid by a buyer to his representative at p.109:

"It is obvious that if the buyer himself goes abroad to negotiate the purchase, or if he sends a salaried employee, their travel expenses and salaries are costs of the buyer and are not to be added to the price as an indirect payment for the goods. There is no more reason to include the cost of hiring an outside agent to perform the same function. Hence the exclusion from customs value of buying commissions. The limitation to representation "abroad" should be liberally construed, so as to cover in full the commission of a buying agent who conducts negotiations partly in the exporter's country and partly in the importer's country."

The authors describe some of the activities of a buying agent at pp.109-110:

"The buyer's agent abroad has functions which go beyond the agreement to purchase. These functions include gathering market information, arranging shipments; inspecting the materials, plant or goods to ensure that quality standards are being met, and any other customary functions. Payments for all such services are excluded."

The Customs Co-operation Council is an organisation established by a Convention signed in Brussels on 15 December 1950. In June 1994 it adopted the informal working name, "World Customs Organisation". It has prepared an agreement on the implications of Article VII of the General Agreement on Tariffs and Trade 1994. In Explanatory Notes to the Articles a buying agent is described as:

"... a person who acts for the account of a buyer rendering him services in connection with finding suppliers, informing the seller of the desires of the importer, collecting samples, inspecting goods and, in some cases, arranging the insurance, transport, storage and delivery of the goods."

The World Customs Organisation has prepared a Customs Valuation Control Handbook. It includes a questionnaire to assist in determining the dutiable status of commissions. Those questions are designed to assist in the determination of whether the person said to be an agent is in fact a genuine buying agent whose fees should not be included in the transaction value. I have also found of assistance a publication of the US Customs Service entitled *Buying and Selling Commissions* (1996) which contains a summary of the factors considered by the Courts in determining whether a purported agent is a *bona fide* buying agent. That publication determines the primary issue as being that of control - does the evidence prove that the buyer is the party in control and that the purported agent is working for the buyer and not himself? The publication records that some factors considered by the Courts which go to the main issue of "control" are:

1. Which party bears the risk of loss for lost or damaged merchandise?
2. Who absorbs the cost of shipping and handling?

3. Which party controls the manner of payment for the goods?
4. Could the buyer purchase from the manufacturers without using the services of the agent?
5. Was the intermediary operating an independent business primarily for its own benefit?
6. Is the intermediary financially detached from the manufacturer or seller?
7. What do the commercial documents show?

These considerations are identified in United States decisions including: *J. C. Penney Purchasing Corp v United States* 451 F.Supp. 973 (1978); *New Trends Inc. v United States* 645 F.Supp. 957 (CIT 1986) and *Rosenthal-Netter Inc. v United States* 679 F.Supp. 21 (CIT 1988). In *J. C. Penny* it was held that the primary consideration in determining whether the relationship was one of agency is the right of the principal to control the agent's conduct with respect to matters entrusted to him. In determining that the relationship was one of agency, the Court noted the evidence to the effect that the plaintiffs were actively involved in the selection of the merchandise, including the selection of the factory. In particular, the evidence that they could have purchased the merchandise direct and that the factories were aware it was the plaintiffs, not the agent who were the purchasers.

In *New Trends* the Court noted the following factors inconsistent with an agency relationship.

1. That the agent was to receive a fixed price for the property irrespective of the price paid by him.
2. That the agent acted in his own name and received the title to the property which he thereafter transferred .
3. That the agent had an independent business in buying and selling similar property.

And in *Rosenthal-Netter* the Court referred to a number of respects in which the plaintiff did not control the supposed agent's conduct.

1. The plaintiff did not control from which factory the agent selected the merchandise.
2. The agent purchased quantities up to ten times greater than the amount ordered by the plaintiff and the manufacturer could not have known that one-tenth of the order was purchased on behalf of the plaintiff.
3. The plaintiff did not control the amount of discretion exercised by the agent in the purchasing process.
4. The plaintiff allowed the agent to absorb the cost of shipping and handling.
5. The plaintiff did not control the manner of payment.

The language used between the alleged agent and the importer in correspondence was identified as being a useful factor in determining the issue.

Compared with the situation that existed in the various United States decisions referred to by counsel, this case has some unusual features. The products had to be purchased from a manufacturer authorised by Wolverine. The purchase orders had to be reviewed and approved by Wolverine. It appears that the manufacturer selected the ship on which the goods would be transported. It seems that on occasions Custom Originals had product air freighted to Australia. Presumably in such circumstances the choice between sea freight and air freight was made by Custom Originals.

In his affidavit Mr Allen, who was a director and shareholder of the appellant, referred to the services which Custom Originals performed for the appellant as including finding suppliers, informing the factory of the desires of the importer, collecting samples and inspecting goods. The appellant arranged its own insurance and generally used its own freight forwarders. He maintained that Custom Originals at no stage had any interest or rights in respect of the shoes which the appellant purchased. He said that if he was a customer he would have been charged a wholesale price for the shoes. There would have been no component breakdowns and the mark-up on factory price would have been considerably more than 31 per cent.

Mr Allen was cross-examined on his affidavit. When asked to what extent the appellant had control over Custom Originals as a buying agent, he said that his company controlled the goods to the degree that it had the power to cancel an order prior to manufacture being commenced in the factory. He said the company nominated its delivery dates and its freight forwarders. He could not think of any other control that he exercised.

Indeed, he described the position of an importer in a small market as being one where the "buying agent" was in a position where the importer was "begging". He said of the buying agents they worked with that:

"They are doing us a favour and we are paying for this service."

He said the most control he could expect to have would be some input into styling, having the footwear made at a time that suited our season, and to be delivered in a timeframe that the appellant required to market the goods in New Zealand.

"So to that degree he was fulfilling our wishes to be able to get product for us at the right time for us to be able to market here. But I wouldn't have called it at any stage a control. In fact most times we were begging."

Mr Allen listed a number of factors which he considered showed the relationship with Custom Originals was that of a buyer/seller. The first factor was that he was not paying a wholesale price which he said would be the landed Australia cost plus at least 50 per cent. Secondly, he said that if he was only a reseller Wolverine would not have sent him their FOB price list every year, together with line drawings of the product. Thirdly, he said that

Custom Originals would not have broken down their costs, such as their Asia to Australia freight because they would not have wanted him to know those things. If the relationship had been that of a buyer/seller he would have had two advantages. He would have got normal credit terms and been able to pay up to 60 days after he got the goods and if he had any faulty footwear he would have been able to send it back. As it was, he had to accept the first two per cent of faulty footwear at his own cost. He said that if he cancelled an order and production had already commenced he would be obliged to take the shoes and failure to do so would put his relationship with Custom Originals in jeopardy. Finally, he said that Custom Originals had no control over the marketing in New Zealand. The appellant decided what shoes would be put into this market.

There is no doubt that there are a number of factors which point to the existence of a buying agent relationship. But there are other factors which in my view outweigh these, and which have brought me to the conclusion that the relationship between Custom Originals and the appellant was not that of agent and principal. These factors may be considered under the three heads of Control, Ownership and Documentation.

Control

The American decisions identify the right of the principal to control the agent's conduct with respect to matters entrusted to him as being the primary consideration in determining whether the relationship is in fact one

of agency. As is clear from the extracts referred to above, Mr Allen had to admit that in fact he was able to exercise very little control in his relationship with Custom Originals. In fact the control seems to have been the other way. Custom Originals appointed the appellant as New Zealand distributor.

Custom Originals' perception of their relationship with the appellant is evident from an interview between Customs Officers and Mr McNickle of Custom Originals. He acknowledged that his company was responsible to Wolverine for the performance of the appellant. He described his responsibility of being heavily involved in putting together the collection and the styling of the shoes that were sold in Australia and New Zealand. He said that he chose the factory from those approved by Wolverine. Contrary to the appellant's contention he described the appellant as the agent of Custom Originals for New Zealand.

Custom Originals had the exclusive right to sell the product in Australia and New Zealand. Such rights as the appellant had ceased to exist when Custom Originals terminated their relationship. Custom Originals placed the orders. Mr Allen admitted that he was entirely dependent on them to do so. He could not place orders independently of Custom Originals. So far as the manufacturer was concerned, if an order was cancelled after manufacture had commenced Custom Originals were obliged to take the product. Similarly, it was Custom Originals' responsibility to pay

for the product that was delivered. It is the case that shipping and insurance costs were paid by the appellant and it appears too that they assumed the risk for damaged or lost goods. Those are normally factors which would point to an agency relationship, but they must be weighed against other considerations.

The appellant had only very limited control in relation to the quantities to be purchased, the type and quality of the merchandise and the method and timing of the shipment. Neither the appellant, nor indeed, Custom Originals had any control over the choice of seller or the price to be paid. Custom Originals had the power and exercised the power to refuse to place an order on the appellant's behalf until they had been paid. They also on occasions, effectively extended credit to the appellant.

By agreement the parties placed before the Court the details of five transactions which they agreed were representative of the 55 transactions the subject of these proceedings. In respect of only one of them was payment made prior to the goods leaving the factory. In the case of three of the transactions payment was made weeks after the date of importation into New Zealand.

In one of the interviews with Customs Officers Mr McNickle said that to expedite the payment process by the appellant he would have the goods held by the factory until such time as he received their payment and would

then let the goods go. In response to the question, "So in effect you controlled the delivery of the goods?" he replied, "Absolutely.". Elitunnel was not able to cancel orders directly with the manufacturers. It had to do so through Custom Originals. It had to rely on Custom Originals passing on that request for cancellation.

So far as Custom Originals is concerned its primary business was the importation of shoes for sale. Its contract with the appellant, whatever its nature, was a minor part of that business. In its relationship with the manufacturers of the shoes, Custom Originals was working to a major extent for itself rather than for the appellant.

In uncontested evidence given on behalf of the respondent it was stated that of the 55 shipments subject to this appeal, 38 were either sourced from stock held by Custom Originals or routed through Australia from authorised factories and only 17 were shipped direct to New Zealand from the authorised factory. In the case of the 17 the arrangement to ship direct to New Zealand was one made by Custom Originals rather than by the appellant. During one of his interviews, Mr Allen stated that he had no control over Custom Originals' placing of Elitunnel's orders with the factories rather than in a particular case supplying footwear from stock. He also said that quite often, at least, in the early stages of their relationship Custom Originals would keep some of the shoes which Elitunnel had

ordered. Three quotations from that interview are illustrative of the relationship. Mr Allen said:

"I never bought shoes that he [McNickle] couldn't sell in Australia because I couldn't so we'd go through the range, I mean I'd go over there and see him and we'd say what's the range going to be. We'd pick out the shoes I'd want. He would say, well I don't like that I'm not going to do that and I'm not going to do that. So okay well I can't that was it."

In relation to his deliveries he said:

"I didn't have control over them and the factories were sort of saying it was like too hard to split it off."

And he said:

"Later I found out that he [McNickle] wasn't actually ordering what he said he was going to order and quite often when I would order shoes in November ... those shoes would turn up in July. I had little control. I was really at his mercy. Trying to keep the thing going here was just a juggling act."

Mr Allen referred to Mr McNickle's reluctance to explain how his 31 per cent commission was made up and when he suggested that 31 per cent was too much Mr McNickle responded that Elitunnel either paid that or Custom Originals would not source the Caterpillar footwear for Elitunnel.

Ownership

Mr Stewart, for the appellant, submitted that a strong factor in support of the claim that the relationship between the appellant and Custom Originals was that of principal and agent, was the fact that the appellant took title to the goods it ordered. He pointed out that Custom Originals have never claimed that they acquired any title or interest in the goods ordered by Elitunnel. He acknowledged, of course, that this was not the

case with purchases ex stock. He submitted, correctly, that even if Custom Originals did obtain title to the goods it was not conclusive as to the nature of the relationship. It is, however, an important factor.

In my view, the appellant could not have obtained title to the goods until it paid for them. As has been seen above in many instances that was not until after the goods had arrived in New Zealand. In fact payment for the goods at the factory was achieved by Custom Originals setting up a letter of credit with the factory at the time of the placement of the order which could be 90 to 100 days prior to the arrival of the product. Given the relationship between Custom Originals and the factory there is no doubt that in the eyes of the seller, Custom Originals was the owner of the goods. Nor, can there be any doubt that if the appellant did not pay, ownership would remain with Custom Originals.

In my view in most, if not all instances, Custom Originals became the owner of the goods with ownership passing to the appellant upon payment for a particular order.

Documentation

I have already referred to the five sample transactions. The documentation of those five orders is helpful in determining the relationship. Each order was directed to Custom Originals. Custom Originals invoiced the appellant. The manufacturer invoiced Custom Originals. In most cases the

bills of lading showed the consignor as Custom Originals and the consignee as the appellant. In the case of the fifth sample entry, the bill of lading shows the consignor as the manufacturer and the consignee as the appellant.

Evidence on behalf of the respondent referred to communications between Custom Originals and the appellant. These include indications by Custom Originals of what could be supplied from stock and a message recording that an order had not yet been placed because the minimum had not been reached. Another communication referred to the quantity not meeting the minimum, but being able to supply out of stock in Australia.

Mr Allen annexed to his affidavit correspondence between himself, Jerryco and McNickle. In one of McNickle's letters to Jerryco he said:

"Ross [Mr Allen] will draw needed replacement stock immediately from me under a system already in operation before us."

This letter was, of course, generated very early in the relationship, but in my view assists in explaining its nature.

Conclusion

Mr Stewart submitted that it was necessary to stand back and look at the reality of the situation. Accepting that invitation, I conclude that the reality of the situation is that Custom Originals was not a buying agent for the appellant. My conclusion is that Custom Originals were not concluding

contracts between the manufacturers of the shoes and the appellant. Indeed, their licensing agreement did not enable them to do so. In my view there was never at any stage a contract between the appellant and the manufacturer. The situation was that Custom Originals placed orders with the manufacturer which included goods which the appellant then purchased from Custom Originals. Those purchase arrangements might be regarded as favourable in comparison with other buyer/seller relationships, but it was an arrangement which had advantages to Custom Originals as well. They were able to use the New Zealand quantities to make up the required minimums. In most cases they received payment earlier than would be the case with a normal buyer/seller relationship and in those circumstances where the appellant's order was shipped direct from Asia the appellant accepted the primary responsibility for its own freight and insurance charges.

The whole relationship between the parties should be considered. That includes the purchases from stock held by Custom Originals and the purchases which involved the goods being shipped to Australia and the appellant's share of them being separately identified only after they arrived in Australia.

I have concluded, therefore, that the Collector was right in the determination he made and that the appeal should be dismissed. The respondent is entitled to costs. If the parties are unable to agree submissions in that regard may be made.

A handwritten signature in black ink, appearing to be 'D. J. [unclear]', located at the bottom right of the page.