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**MOBIL OIL OF AUSTRALIA LIMITED -v- LIAPARI LIMITED**

**High Court of Solomon Islands**

**(Palmer J.)**

Civil Case No.       **180 of 1991**

Hearing:               **10 March 1994**

Judgement:           **15 June 1994**

**T.J. Glenn** for Plaintiff

**A. Radclyffe** for the Defendant

**PALMER J:**       The Plaintiff (Mobil Oil of Australia Ltd) and the Defendant (Liapari Ltd) were parties to an Agency Agreement which date as far back as 1985. Under the terms of that agency agreement, the Defendant was to act as distributor of the Plaintiff's products at the Western Province of Solomon Islands. In return the Defendant was paid commission at varying rates depending on the type of product.

In or about April of 1987, the agency agreement was terminated, as a result of an unsatisfactory state of accounts being maintained by the Defendant with the Plaintiff. In September of 1987 the parties entered into an agreement whereby there was an acknowledgment of debt by the Defendant to the Plaintiff for \$356,290.02, and a scheme of repayment of the debt included. That agreement is dated the 30th September 1987.

On the 18th of November 1987 an addendum was added to the agreement which stipulated that provided that the Gizo depot was run properly, and the terms of the Acknowledgment and Scheme Agreement complied with for a period of one year, then the Defendant would be appointed as sole agents for the sale and distribution of the Plaintiff's products for the whole of the Western Province. A copy of that agreement has been filed as an exhibit and marked as Exhibit 'C'.

The claim of the Plaintiff is founded largely on the contention that there was an oral agency agreement, entered into between the parties in or about the month of October 1987. The Plaintiff's claim that after the termination of the previous agency agreement, it was agreed by the parties to enter into a new agency agreement. They allege that it was a term of the agreement that 'the Plaintiff delivered the products at its depot at Gizo and the Defendant was to manage the depot, sell the products and keep

account for all products received and sold.' It was also contended a term of the agreement that 'the plaintiff invoiced the defendant for all payments due to it and the Plaintiff allow credit notes and rebates as commission for the services rendered by the Defendant.' The claim of the Plaintiff in essence is a straight forward claim of debt for monies due and owing, as spelled out in the Statement of Claim.

The defence of the defendant on the other hand is that, all monies due had been paid for and accounted for.

The Defendant had also filed a counterclaim together with its Defence, details of which are set out in the Amended Counterclaim filed also on the 25th of March 1994.

**TERMS OF THE AGENCY AGREEMENT:**

It is clear that there is no written agency agreement between the parties, though clause 5 of the Acknowledgment of Debt and Scheme of Repayment Agreement (the 'Debt Agreement'), stipulated that a written agreement would be entered into between the parties. There is no evidence or insufficient evidence, that a written agency agreement was ever executed between the parties.

Had a written agreement been entered into between the parties and produced, then some of the uncertainties and confusions that have given rise to some of the issues before this court, may not have occurred. The court is therefore left with the unenviable task of ascertaining for the parties, the terms of an oral agreement which both parties cannot agree on.

The Debt Agreement however, does provide useful assistance as to the basis on which the Agency Agreement was to be founded. It is useful therefore to set out in full, clauses 5 and 6 of the Debt Agreement, and the Addendum as added and executed on the 18th of November 1987.

*"Subject to compliance with the foregoing Mobil hereby agree to enter into a "Mobil Direct Purchase Agency Agreement") with Liapari Ltd. whereby the latter Company shall be appointed as sole agent for the distribution and sale of Mobil products in Gizo Western Province, Solomon Islands. The said Agency agreement shall be for a term of four years commencing on the first day of October 1987 and shall be subject to all the terms and conditions therein and in particular the following terms shall apply:-*

(a) Commission shall be payable throughout the said term by Mobil to Liapari Ltd. at the rate of SBD\$00.0238 per litre for refined products, and SBD\$00.10 per litre for lubes and greases.

(b) The method of operation shall be "B/DP", which in this agreement shall mean that all bulk refined product shall be owned by Mobil on consignment and all drummed refined product and lubes shall be purchased direct from Mobil and owned by Liapari Ltd.

Further to the Agency Agreement referred to in paragraph 5 above and in no way limiting the generality of the terms thereof, Liapari Ltd. hereby agrees to conduct its operations in Gizo in accordance with sound business practices and to Mobil's standards of safety and depot operating practice, as set out in the said Agency Agreement. In pursuance whereof Mobil hereby agrees to provide a sufficient amount of depot operating expertise to adequately train Liapari Ltd.'s personnel, both at the outset of the Agency Agreement and throughout the duration thereof. In consideration thereof Liapari Ltd. shall employ a suitable full-time depot manager whose sole responsibility shall be the day to day operation of the fuel depot business at the Gizo depot. Liapari Ltd. further agrees that its management shall institute a system of regular checks and controls to ensure that the Gizo depot continues to operate in an efficient manner. What amounts to "sufficient", "adequate", "suitable", and "efficient", as those terms appear in this paragraph shall be entirely at the discretion of Mobil.

#### ADDENDUM

Further to the Acknowledgment of Debt and Scheme of Repayment dated 30th September 1987 entered into between Liapari Limited and Mobil Oil Australia Limited it is hereby agreed by the parties thereto that provided that the Gizo Depot is run satisfactorily and the terms of the said Acknowledgment and Scheme are complied with for a period of twelve months from the first day of October 1987 then Liapari Limited shall be appointed as sole agents for the sale and distribution of Mobil products for the whole of the Western Province."

I am satisfied that clauses (5) and (6) of the debt Agreement and the Addendum, provide some clear guidelines as to a number of terms that should be included in the Agency Agreement. And on top of that, the manner in which the Agency Agreement was acted upon in practice as between the parties is of crucial importance.

One of the more obvious stipulation in Clause (5) and the Addendum, is that the defendant 'shall be appointed as sole agent for the distribution and sale of Mobil products in the Western Province.'

The first obvious point to note is that there is no evidence of any written instrument of appointment of Liapari Limited as sole agent. It is not clear either when a verbal appointment was made. However, part of clause 5 of the Debt Agreement did stipulate that the agency agreement was to commence on the 1st of October 1987 and shall run for a term of four years. It is not in dispute that Liapari Limited took over the operations of the Gizo Depot on an agency basis, on or about October of 1987. It is not in dispute that no other agent was appointed throughout the Western Province for the distribution of the Plaintiff's products.

What is in dispute is the interpretation of the term 'sole agent for the distribution and sale of Mobil products in the western Province'.

The Plaintiff claims that the above phrase meant that the Defendant was the 'sole agent' and that the Plaintiff would not appoint any other agent. The Plaintiff claims that this did not prevent the Plaintiff from selling direct to customers in the Western Province large enough for it to make deliveries of its products to.

The Defendant on the other claims that that phrase meant that the Defendant would be the sole seller and distributor of the Plaintiff's products in the whole of the Western Province. Accordingly, as part of its counterclaim the Defendant claimed that there had been a breach of the Agency Agreement when the Plaintiff sold its product direct to certain customers in the Western Province.

It is important to note that the Debt Agreement is to be read as providing guidance or assistance as to what the terms of the Agency Agreement were. It is not the Agency Agreement. Accordingly, the conduct of the parties as to the performance of the Agency Agreement is material to the correct interpretation of the phrase 'sole agent.' In other words, how was the dealings between the parties, conducted throughout the term of the agency Agreement? The question as to how the parties have acted upon the Agency Agreement is material in ascertaining what the terms of the Agency Agreement are, in circumstances where the terms are uncertain. In this particular case, it is not disputed that the Plaintiff had been making direct sales to a number of large customers, in particular, Levers, Kalena Timber company Limited, Solomon Taiyo Limited, United Church at Munda, and Solomon Islands Electricity Authority at Gizo.

The conduct of the parties must be taken into account as a relevant consideration in ascertaining what the proper terms of the Agency Agreement are.

In the case of *W.T. Lamb & Sons -v-Goring Brick Co. (1932) 1.K.B 710, at page 721, per Greer LJ*, the learned Law Lord stated:

*"In my opinion therefore it is not necessary to consider how this contract was acted on in practice. If there had been an ambiguity and the intention of the parties had been in question at the trial, I think it might have been held that the parties had placed their own construction upon the contract and, having acted upon a certain view, had thereby agreed to accept it as the true view of its meaning."*

The ambiguity in the terms of the Agency Agreement and the intention of the parties stem from the fact that the purported terms of the Agency Agreement were to be derived from Clause (5) of the Debt Agreement, and the Addendum. Although the term 'sole agent' is fairly straight-forward and not in dispute as a term of the agency agreement, the absence of a written agency agreement makes it difficult to ascertain whether the interpretation as given by the Plaintiffs is the correct one, or the interpretation preferred by the Defendants. Hence, it is important to consider how the contract was acted upon in practice.

The crucial question therefore should be, what is the correct interpretation of the term 'sole agent for distribution and sale of Mobil Products in the Western Province'.

There are several English cases which have dealt with the question of construction of the term 'appointment of sole agents.' These English authorities have weaved a fine distinction which in my view does provide some assistance as to the resolution of the same question of construction in this case. The first case is *Bentall, Horsley and Baldry -v-Vicary (1931) 1 K.B. 253*. The Defendant, in that case, who was the owner of a house had appointed the plaintiffs, who were estate agents, his 'sole agents for the sale of the house'. It was agreed inter alia that, if the plaintiffs introduce a purchase, they would receive a commission of 5 percent on the purchase price. During the period of the agency the defendant negotiated personally with a purchaser, and as a result of that, the property was sold to that purchaser directly. The plaintiffs accordingly claimed, that there had been a breach of contract, and that they had been deprived of their commission. They alleged that the above term 'gave to them, and to them alone, the right to sell the property and that, therefore, the defendant had committed a breach of contract by disposing of it himself.' In considering the argument of the plaintiff in that case, the learned judge, McCardie J, took the view that in order

for the plaintiff to succeed, they had to show that there was an implied term of the agreement that the defendant should not himself sell the property.

At page 261, the learned judge stated:

*"It is quite open to a property owner to agree that an estate agent shall have the sole right to dispose of the property and that no one else, whether another agent or the owner himself, shall deal with the property during the contract period. If, however, such a bargain is intended, then clear words must be used."*

In the case before me, the same approach as taken by McCardie J. in my view is applicable. The Defendant's argument can be put as saying that it was an implied term of the Agency Agreement that the Plaintiff should not make any direct sales of its product within the Western Province, but that the Defendant rather had the sole right to sell and distribute the plaintiff's products. By making direct sales the plaintiff had acted in contravention of the Agency Agreement. I agree with McCardie J. that where such a term is intended then clear words must be used.

*In Bentall Harsley & Baldry -v- Vicary (ibid), the learned judge pointed out that 'the Court ought not to introduce an implied term into the contract unless such implication is needed for "such business efficacy to the transaction as must have been intended at all events by both parties who are business men"'. And quoting Lord Esher M.R. in Hamlyn & Co. v Wood & Co. (1891) 2 Q.B. 488, at 491, the learned law Lord stated: "I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned."*

McCardie J. did not find any reason why an implied term would have to be incorporated into the contract to give business efficacy to it. He found that the contract contained no express words which indicated a prohibition against a sale by the defendant himself. He continued: *"If the parties intended such a prohibition nothing would have been easier than to insert the appropriate words. It is also to be noted that the defendant does not say by the contract: 'I give you the sole right to sell.' He says only: 'I appoint you sole agent for the sale,' which is, in my opinion, quite a different thing."*

The same questions as raised in *Bentall Harsley & Baldry -v- Vicary (ibid)* can also be raised in my view with regards to this case. Is it necessary that a prohibition to direct sales should exist, such that it can be said that it must have been intended by the parties to exist?

In the case of *Luxor, Ltd v Cooper (1941) 1 All E.R at page 52, 53, per Lord Wright*, similar questions were posed by the learned law Lord:

*"It is agreed on all sides that the presumption is against the adding to contracts of terms which the parties have not expressed. The general presumption is that the parties have expressed every material term which they intended should govern their agreement, whether oral or in writing. It is well-recognised, however, that there may be cases where obviously some term must be implied if the intention of the parties is not to be defeated, some term of which it can be predicated that "it goes without saying," some term not expressed, but necessary to give to the transaction such business efficacy as the parties must have intended. This does not mean that the court can embark on a reconstruction of the agreement on equitable principles, or on a view of what the parties should, in the opinion of the court, reasonably have contemplated. The implication must arise inevitably to give effect to the intention of the parties. These general observations do little more than warn judges that they have no right to make contracts for the parties. Their province is to interpret contracts. However, language is imperfect, and there may be, as it were, obvious interstices in what is expressed which have to be filled up. Is there, then, any reason in the present case for thinking that there is some defect in expression, or something omitted because it seemed too obvious to express?"*

The question therefore that can also be posed in this case too is: Is there any reason for thinking that there is some defect in expression, or something omitted because it seemed too obvious to express? With respect to the submissions of the Defendant, I too am unable to find any such reason. I agree with the comments of McCardie J. at page 258, that there is a difference between the expressions 'sole right to sell' or 'sole selling rights', as opposed to the term 'sole agent for'.

The Defendant's submissions is that the term 'sole agent' should be interpreted as giving the Defendant sole selling rights and distribution rights throughout the Western Province, but with respect that is not what the agency Agreement said.

The second English case is the case of *W.T. Lamb and Sons -v- Goring Brick Company, Limited (1932) 1 K.B 710*, already referred to in this judgment. The facts of that case were that, by an agreement in writing, the defendants, who were manufacturers of bricks and other building materials, appointed the plaintiffs, who were builders' merchants, 'sole selling agents of all bricks and other materials manufactured at their works'. The defendants then informed the plaintiffs by letter

that they intended to sell the bricks themselves. The defendants then sold some of the bricks themselves and shortly after, gave twelve months notice to terminate the contract. The plaintiffs accordingly filed an action for breach of contract. In the Court of First Instance, Wright J. held that the expression 'sole selling agents' meant that "the plaintiffs were to have the sole right of selling in their capacity as agents all the bricks and other materials manufactured by the defendants at their works without any reservation in favour of the defendants themselves". In coming to that conclusion, Wright J. applied the use of those words in the commercial sense.

On appeal to the Court of Appeal, the first Court of appeal Judge, Scrutton L.J. pointed out the difference in an agreement in which goods were bought and then sold, on one hand, as opposed to the case of a sole agent who sells property and then is paid commission in return. He stressed the point raised by *McCardie J. in the case of Bentall - v- Vicary (1931) 1 K.B 253*, that 'no general rule can be laid down and that the wording of the agreement in each case must be carefully considered.' The learned law lord then continued:

*"The agreement in the present case is one of a different class, contemplating contractual relations extending over a period of three years or more, dividing the business of manufacture from that of distribution, whereby the one party, the manufacturers, are to make the goods for three years and the other party, the merchants, are to continue selling them for three years and paying the price monthly to the manufacturers. Here the words 'sole selling agents' have a distinct meaning implying that the manufacturers are to sell to no one but the merchants who pay them the fixed price, and the merchants sell, and they are the only persons to sell, to various builders and contractors. Bentall v. Vicary therefore has no bearing on this case."*

The second Court of appeal Judge, Greer L.J. more or less said the same thing as Scrutton L.J. At page 720, he states: *"It is somewhat remarkable that notwithstanding the numerous cases in which the difference between a buyer and an agent has been pointed out, there are still innumerable persons engaged in business who do not understand the simple and logical distinction between a buyer and an agent for sale, but are content to treat the two words as synonymous."*

At the bottom of the page he continues:

*"I can only read that document as an agreement in which the manufacturers are the sellers and those who are called selling agents are to be the buyers over a period of three years of the goods described in para. 1, i.e., 'of all bricks and other materials*

*manufactured at their works." The case of Bentall v. Vicary was distinguished in the same way.*

The third Court of Appeal judge concurred with the judgment of the two previous judges.

In Bowstead on agency, 14th Edition at page 190, the learned author citing the case of *Luxor (Eastbourne) Ltd. v. Cooper (1941) A.C. 108*, explained what the correct approach should be in such cases of breach of an agency agreement. Although the issue before the court in that case was slightly different to this case, the underlying principle in my view is quite relevant. It is not in issue that for the principal to be liable in damages to the agent, the principle must be in breach of some term of the agreement. If there was no express term on which the agent can rely, then ultimately he must seek to establish that there is an implied term on which the principal had breached. The learned author pointed out that if the agent contends that there is an implied term, then he must satisfy the court that the term was necessary to give business efficacy to the contract or to effect the intentions of the parties.

In this particular case the defendant must either point to an express term or an implied term in the agreement, which the Plaintiff had breached. The term which the Defendant alleges that the Plaintiff had breached was to the effect that the Plaintiff was not permitted under the agency Agreement to sell its products directly to anyone else within the Western Province. There is no express term to that effect and so the only viable position to be taken by the Defendant is to assert that there existed an implied term.

The learned author in Bowstead on Agency, (ibid) at page 190 then went on to consider the position of sole agencies. The learned author took the same view that, where a sole agent is appointed for the sale of property, that a principal will not be in breach of the agency agreement by negotiating the sale of the property himself. The learned author cited the case of *Bentall, Horsley & Baldry V. Vicary (1931) 1 K.B. 253*, in support.

Also, the learned author in Chitty on Contracts Vol 2, 21st Edition at page 44 and 45, took the same view, that: "*In the absence of an agreement to the contrary, the fact that the principal puts property into the hands of an agent for sale does not prevent the principal from selling the property himself, and if he does so before the agent has effected a sale, he is under no liability to pay any commission. If a person is appointed as "sole agent," the principal may not employ any other agent, but if he sells the property himself, he is not liable to pay commission or damages to the agent*".

It is fairly clear in my view that there is no express term which says that the Plaintiff may not sell or distribute its products within the Western Province other than through the defendant. That in essence means that in order for the Defendant to succeed in its claim for damages for breach of contract it must necessarily establish the existence of an implied term to that effect.

Should an implied term be imputed to the Agency Agreement?

It is my humble view that that cannot be done. First, I agree with the words of the learned law lords in *Bentall Horsley & Baldry -v- Vicary (ibid) and Luxor, Ltd -v- Cooper (ibid)* that a term can only be implied to give business efficacy to the agreement. It must be done by necessary implication and not simply because it would be a reasonable thing to do.

The Agency Agreement in this particular case had been in operation for some three years without such an implied term being relied on.

Secondly, it is not disputed that the refined products were sold by way of consignment. This meant that the refined products stored in bulk at the Gizo Depot remained the property of the Plaintiff until sales were made, either to the Plaintiff's customers or the defendant's customers. Commission is then payable at the rates as provided for in Clause 5(a) of the Debt Agreement. The sale of the Plaintiff's products with the exception of lubes and greases, on consignment basis is crucial to the interpretation of the term 'sole agent' as it reflects the relationship of a principal and an agent. This is to be contrasted with W.T. Lamb's case, in which the relationship between the plaintiff and the defendant was that of a buyer and a seller, though the words 'sole selling agent' were used. The plaintiff's products were bought by the Defendant and re-sold to third parties. The court held that the plaintiff in that case was prevented from selling directly to third parties.

The third distinction in this case is to be seen in the plain and ordinary meaning of the words 'sole agent'. I am prepared to accept the differences brought out by McCardie J. in his judgment already referred to in the words 'sole selling agent' or 'sole right to sell', as opposed to 'sole agent'. The latter refers to the appointment of the Defendant as the sole agent in the Western Province for the distribution and sale of the Plaintiff's products, but **does not** prohibit the plaintiff from making direct sales to its large customers. Where the plain and ordinary meaning is clear then it is not necessary to imply a term.

Fourthly, I am satisfied that the Agency Agreement had been conducted between the parties primarily on those premises. The Defendant was paid commission on sales

through the Gizo Depot but not otherwise. It is not in dispute that the Plaintiff made direct sales to certain customers in the Western Province, including Levers, Solomon Taiyo Ltd, Kalena Timber Company Limited, United Church at Munda and the Solomon Islands Electricity Authority.

It seems such an obvious point that if there was such a term of the Agency Agreement prohibiting direct sales to other customers, that the Defendant would have either rescinded the agreement or taken the matter up as a matter of urgency or priority on the very first breach.

Where there is ambiguity in the terms and the intentions of the parties, then the manner in which the agreement has been acted upon by the parties does provide a useful guideline as to how the parties view the agreement and the construction of the terms as accepted by them. I am satisfied that the proper and correct interpretation of the words 'sole agent for the distribution and sale of the Plaintiff's products in the Western Province' mean that no other agents shall be appointed by the Plaintiff during the currency of the Agency Agreement. It did not prohibit the plaintiff from making direct sales to other customers.

Various canons of construction have been referred to for assistance in the construction of the term 'sole agent for the distribution and sale of Mobil's products in the Western Province'. I will refer to only a few of them.

The first canon of construction referred to is that on objectivity and subjectivity. The learned author in the text on 'Interpretation of contracts' by Kim Lewison 1988 Edition, Sweet & Maxwell Publication at page 9, referred to the case of *Vitol B.V. v. Compagnie Europeene des Petroles* (1988) 1 Lloyd's Rep. 574, per the judgment of Saville J. at page 576, in which the learned judge stated: "*The approach of the English law to questions of the construction of contracts of this kind is to seek objectively to ascertain the intentions of the parties from the words which they have chosen to use. If those words are clear and admit of only one sensible meaning, then that is the meaning to be ascribed to them - and that meaning is taken to represent what the parties intended. If the words are not so clear and admit of more than one sensible meaning, then the ambiguity may be resolved by looking at the aim and genesis of the agreement, choosing the meaning which seems to make the most sense in the context of the contract and its surrounding circumstances as a whole.*"

Applying Saville's J. comments to this case, is the term 'sole agent' in the context of this case, ambiguous? I do not think so. The meaning is plain and in my view capable of only one sensible meaning; that is, that no other agents may be appointed by the Principal (the Plaintiff), during the currency of the Agency Agreement. The

contract was conducted in essence along those lines, and accordingly, the Defendant must be presumed to have intended to construe the agreement along those lines.

But even, if it is to be held that that term was ambiguous, I am still satisfied that the more reasonable and sensible interpretation is as already described.

The second canon of construction referred to was the question of what the commercial purpose of the contract was. The Plaintiffs pointed to the fact that prior to October of 1987, no commission was payable on such sales. Secondly, that those sales involved certain customers to whom the Plaintiff could effect bulk sales to, without having to go through the Gizo Depot; and finally, that the Defendant had little or nothing at all to do with those sales.

Learned Counsel for the defendants submitted on the other hand, that the Defendant would not have entered into such an arrangement but for the fact that it would be making the sales and distribution alone for the Western District, as it knew that it would not be profitable for it to so enter into such an agreement with such a limitation. Unfortunately, it did enter into such an agreement and did conduct its operations on those terms. If it was of the view that it would be making a loss by the actions of the Plaintiff then it should have rescinded the contract right from the beginning when the first breach occurred. There is however, an important point to bear in mind on this canon of construction as stated in *Lewison at paragraph 1.07*: *'where the words of a contract are clear, the court must give effect to them even if they have no discernible commercial purpose.'*

The third canon of construction, is to construe the words in their ordinary sense except to avoid absurdity, inconsistency or repugnance. The question is, whether the ordinary and natural meaning of the words 'sole agent' are inconsistent with the terms of the Agency Agreement. With respect, I am unable to so find. The ordinary and natural meaning of the words 'sole agent' is consistent with the Plaintiff's actions in selling directly to customers of its choice which were big enough to be so dealt with in that manner. In the whole of the Western Province, the Defendants are to be the only agents for the sale and distribution of the Plaintiff's products. If the Plaintiff appoints someone else as agent, in the Western Province, then that would be in breach of the Agency Agreement. The Plaintiff is not in breach of the Agency Agreement by selling directly to certain customers. The relationship between the Plaintiff and the Defendant is that of a principal and an agent, and therefore it is important that where there is to be a prohibition of direct sales then that must be made clear. The plain and ordinary meaning of the term in my view cannot be extended to include a prohibition of the Plaintiff from making direct sales to other customers of its choice. To do so would be

to read words into the contract, which is not the function of this court, but to interpret the words as used.

The next canon of construction referred to was to construe the document as a whole. At page 124 of Lewison's text, paragraph 6.02, it reads: 'In order to arrive at the true interpretation of a document, a clause must not be considered in isolation, but must be considered in the context of the whole of the document.'

In the context of this particular case, I am satisfied that commission is payable on the sales made through or by the sole agent, i.e. sales that went through the Gizo Depot. Any other sales, in this particular case, direct sales, do not come within the purview of the Agency agreement. There is no express term to that effect and no implied term can be imputed.

Throughout the term of the agreement, commission had been paid for the Plaintiff's products that went through the Gizo Depot. The Defendant had not been deprived or prevented from earning commission on the through-put at the Gizo Depot. This is consistent with its appointment as sole agent for the sale and distribution of the Plaintiff's products on consignment basis. The direct sales made by the Plaintiff are separate from the terms of the Agency Agreement. And accordingly, it would not be proper to imply a term in that context.

The final canon of construction referred to is on the reasonableness of the result. In the text by Lewison at paragraph 6.13, the learned author cited several case authorities to bring out this point. (see *Tillmanns & Co. v. S.S. Knutsford Ltd (1908) 2 K.B.385*, *Schuler (L) A.G. v. Wickman Machine Tool Sales Ltd. (1974) A.C. 235*, per judgment of Lord Morris of Borth-y-Gest, and Lord Reid.)

*The judgment of Lord Diplock in the case of The Antaios (1985) A.C.191, describes this canon of construction succinctly: "...if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense."*

The Plaintiff submits that if commission is to be paid on all other direct sales of the Plaintiff to its other customers then that would result in increases of payments from \$65,000.00 to rise dramatically to about \$700,000.00. That according to the Plaintiff would be ridiculous because even if they were to accept that the rate of commission (which was not conceded) was to be calculated at 20% above unsubstantiated costs at \$122,000.00, then that would come only to about \$146,000.00. An increase to \$700,000.00 they say would be absurd and not in accord with business common sense.

The Defendants on the other hand submit that it couldn't be any business common sense that the Defendant would seek to enter into an agreement whereby they would be making a loss.

The submissions of both parties in those respects is justifiable. The answer perhaps lies somewhere in the middle. In that regard, I take note of the submission of learned counsel for the Plaintiff, in which a figure of \$208,000.00 was obtained using estimate figures on profit sales of the defendant, at 2,500,000 litres multiplied by 1/3 (being the volume of profit sales) and multiplied by a mark-up price of \$0.25 per litre. The Plaintiff used those estimate figures to justify the terms of the Agency Agreement as amounting to business common sense. I reiterate that those are estimated figures only. If lower figures of 10% volume and a mark-up price of only \$0.20 is used, then based on the unproven running costs of between \$122,000.00 and \$145,000.00, the Defendant would just be breaking even on the commission and retail sales it makes.

This canon of construction in this particular case in my view is not very helpful as it is dependant so much on what figures this court would accept as showing the more accurate picture as to the operations at the Depot. I have been urged by learned Counsel for the defendants to accept the version of the defendant's witness, Mrs Radford on the grounds that she was more closely associated with the day to day, if not, on a weekly or monthly basis, and therefore her accounts would be more accurate and should be preferred. Although, I am inclined to agree with that, I am not satisfied that that fact alone assists the Defendants any further as to the proper construction to be given to the terms of the Agency Agreement.

I am satisfied therefore that there has been no breach of the Agency Agreement by the Plaintiff.

The counterclaim for commission at the rate of \$0.0238 per litre on the Plaintiff's direct sales in the Western Province not made through the Gizo Depot accordingly must be dismissed. Further, the counterclaim for commission at the rate of \$0.065 per litre on all sales through the Gizo Depot as a reasonable rate of commission consequent upon the Plaintiff's breach of the sole agency agreement, must also be dismissed.

**CLAIM FOR COMMISSION AT 20% OVER RUNNING COSTS.**

At paragraph 3(1)(ii) of the Amended Defence and Counterclaim filed on the 24th of March 1994, the Defendant alleged that in or about April of 1990, Mr John Conroy, a representative of the Plaintiff's and Mrs Janita Radford, of the Defendant, calculated that the cost of running the depot was approximately \$140,000.00 per annum. It was further alleged that Mrs J. Radford was then advised by Mr Conroy that a Mobil Agent should receive commission at 20% over the running costs of the depot. The Defendant alleged that the above discussions formed a term of the Agency Agreement.

The evidence in support of this claim has been produced exclusively by Mrs Janita Radford under oath, plus documentary evidence provided in the form of correspondences between Mrs Radford and John Conroy of the Plaintiff Company.

The evidence of Mrs Radford in essence was that there had been a meeting with John Conroy of the Plaintiff Company in April of 1990, in which the issue of the running expenses of the depot were discussed. The details of those expenses had been noted down in a standard form produced by Mr Conroy and a copy submitted to Court marked as 'Exhibit G'.

In that discussion, the question of a new commission rate was also raised. Mrs Radford claimed that John Conroy agreed with her that her concern was justifiable and suggested to her that it should be about 15-20% above the running expenses. Mrs Radford stated that John Conroy told her to put in writing her concerns, but in fact he dictated the terms of the letter to her. A copy of that letter has been submitted to court and marked 'Exhibit D'. Mrs Radford does not take issue with the contents of that letter as not containing a fairly accurate record of what transpired at that particular meeting. Paragraph (1) of that letter reads: *"Following your visit to our office and our discussion regarding new commission rates .... I would like to set down herewith our understanding of what has transpired. We have discussed the matter of a new commission rate to be effective 1st May and also the fact that we have suffered considerable losses over the last years as a result of inadequate commission and the prevention by one of your staff of our inability to cope with repayments to the Mobil account. We have shown that our expenses are running at around \$140,000.00 per annum and this is the basis for the submission. Following the implementation of a new and acceptable commission rate, we anticipate that we will be able to pay instalments on Mobil's account..."* At page 3 of the letter in the postscript, it reads: *"On acceptance of these terms, we will instigate proceedings to implement the above-mentioned mortgage."*

From the oral evidence of Mrs Radford and the contents of the above letter, it is clear that no agreement was reached between the Plaintiff and the Defendant as to the

question of a new commission rate. There is no evidence to show that John Conroy had the authority of the Plaintiff to enter into any binding agreement with the Defendant. It may be that John Conroy did mention a figure of 15-20% over the running expenses, but there is no evidence that he had authority to agree on that rate, and that would seem to be the reason, why when he dictated the letter to Mrs Radford, there was no mention of any specific figure. The postscript at page 3 of the letter in my view needs no clarification or explanation. It shows clearly that at the time of the writing of the letter, it could not be said that there was a meeting of the minds, or a consensus ad idem. Under cross-examination Mrs Radford admitted that no agreement was ever reached with John Conroy during their discussions concerning the question of any adjustment to the commission rates. There is no evidence to support the claim of the Defendant that an agreement was reached between the Plaintiff and the Defendant at that meeting. The only other documentary evidence submitted to this Court on this point is a letter from Mrs Radford dated 9th September 1990. At page 1, paragraph (a) of the letter, there is a reference to commission: *"The repayment schedule outlined depends on a satisfactory rate of commission and remuneration being implemented from 1/5/90 and this was explicitly stated both at a meeting with Lex Cusin and Ian Scobie and at several meetings with John Conroy. It is also worth noting that despite his repeated assertions that he was dedicated to both our problem and customer relations in general as a personal responsibility, we have not had one word of contact from John Conroy since he left."*

The tone of the above quotation in my view can only point to the conclusion that even as late as September of 1990, and bearing in mind that the Agency Agreement was terminated in October of 1990, the Defendant could not produce sufficient evidence to support its claim that an agreement had been reached between the parties on the question of a new commission rate. This can only mean one thing, and that is that, there is no term in respect of a new commission rate in the vicinity of 15-20% above expenses, as claimed by the Defendant. That aspect of the claim of the defendant in paragraph 3(1)(ii) of its Amended Defence and Counterclaim must accordingly be dismissed.

#### **CLAIM FOR REASONABLE COMMISSION**

The claim for a reasonable commission by the Defendant is made under paragraph 3(2) of the Amended Defence and Counterclaim filed on the 24th of March 1994. The basis on which this claim is made by the Defendant is not known. However, it is trite law that the Courts may imply a term which provides for a reasonable price, where the contract is silent as to price. (*see Foley v. Classique Coaches Ltd, (1934) 2 K.B. 1*) The Agency Agreement in this case however, is not silent as to the rate of commission to be payable. It specifically provided for commission rates at \$0.0238 per litre for refined

products and \$0.10 per litre for lubricants and greases. This claim too must be dismissed.

#### **CLAIM FOR UNDERPAID COMMISSION**

Paragraph (3) of the Counterclaim states that between the period of October 1987 and October 1988, the volume of the throughput of fuel at the Gizo Depot was 2,500,000 litres. Commission of \$0.0238 cents per litre was paid on only 2,100,000 litres. There was therefore an underpayment of \$9,520.00. Unfortunately, there is no evidence produced to support this claim. Rather, the evidence adduced by the Plaintiff tends to show that all commission due had been paid up. This was done by using the estimate figures of 2,500,000 litres per annum multiplied by \$0.0238 cents per litre multiplied by three years. This gives an estimate figure of \$178,500.00 of commission for the three years. The Plaintiff's submit that a total of \$180,000.00 of commission was paid for those three years, which is slightly above the figure estimated. I am not satisfied accordingly on the balance of probability that this claim should be allowed.

#### **ACCOUNTING DISPUTE**

The accounts as produced by the Plaintiff which have been disputed by the Defendant, have been conveniently set out under 25 categories, and marked as note 1 to note 25.

##### **Note 1:**

This referred to the amount of \$2,250.00 which had been credited to the defendant's Management Account with the Plaintiff. The Management Account was opened to cater for the debt as contained in the Debt agreement. This was at the figure of \$356,290.02. It is not in dispute that the above amount of \$2,250.00 was credited to that account. That simply meant that that amount went in the favour of the defendant. It is not clear to me why that amount was transferred to the Management Account. However, I am satisfied it had been credited in favour of the Defendant. Exhibit 'Q' as submitted by the Plaintiff showed very clearly that that amount had been credited. I am satisfied accordingly there is no basis to this dispute.

##### **Note 2:**

This referred to invoice numbers which had been altered, so that the numbers on the statement were different. There were at least 42 documents which fell into this category.

In his evidence before this court, Michael James Wells, the Account and Finance Manager for the Plaintiff for Papua New Guinea and Solomon Islands, explained that the reason for the alterations in the document numbers was because the computer in Port Moresby processing the statements had a pre-allocated numbering system for each agency, so that if the numbers of the document that come before it for processing do not fall within that range as contained in the computer, then the numbers are changed. Mr Wells pointed out that those documents are easily identifiable, as only the number is changed, but the other details, such as the date, product price, description etc., remain the same. Examples of such changes are contained in exhibits 'L' 'M' 'N' 'O' 'P'. I am satisfied with the explanation provided by Mr Wells and therefore must dismiss this dispute.

**Note 3:**

What is alleged under this claim is that the Defendants had been prevented from obtaining copies of supporting documents by the Plaintiff. The Plaintiff however say that the claims made did not have any supporting document, and accordingly, they have requested supporting documents to prove that the debts were due, or owed. The Defendant has failed to show what sort of documents it had been prevented from obtaining by the Plaintiff.

At least, what should have been shown against the various claims under this category is what they were for, and what documents were necessary to prove them. This has not been done by the Defendant and accordingly this dispute must also be dismissed.

**Note 4:**

This dispute has been waived and accordingly is discounted.

**Note 5:**

This is a claim for expenses by the defendant. Unfortunately, there is no supporting document to show what this claim is about and for. I appreciate the difficulty that the Defendant may have in recalling the details and the paper work in support of these, but in the absence of sufficient supporting evidence, I am unable to allow this dispute.

**Note 6, 8, & 10:**

The evidence in support of these claims is virtually non-existent. Under cross-examination, Mrs Radford stated that she did not know if the amounts mentioned under those categories were due or not. These are dismissed accordingly.

**Note 7:**

I am satisfied this claim should be allowed. This claim is not disputed in substance. I am satisfied that all drummed products on arrival at the depot belonged to the defendants. Accordingly, if it is accepted that a sale of drummed products had been made to a Mobile Customer, and that sale had been done at a price only of the drummed products excluding the price of the drums, then the Defendants can claim the cost of those drums from the Plaintiff. The amount allowed is \$1,575.00.

**Note 9:**

The claim under this category is contained in document No.21(b), in folder marked, Exhibit A. That document is dated 7/5/90. The allegation is that those items listed in document 21 (b) had been omitted from other GR's. The amount came to \$41,093.88.

The Plaintiff on the other hand submits that all those items listed had been credited to the Defendant's account, and accordingly that claim was false. Several items were picked up by the Plaintiff as examples to demonstrate to the Court how they had already been credited in favour of the Defendant. The first example was in respect of item No. 2119. The Court was referred to document No.35, 6th page, of the bundle of documents contained in Exhibit 'B'. Document No.35 is a statement of account of the defendant with the Plaintiff for the month ending May of 1990. The amount credited under that amount was \$1,301.60. The second example used was item No. 2103. At page 7 of document 35, the amount credited was \$5,562.34. Further down the page is item No. 2105, and the credit shown is \$44,139.12. Item 2076 is found in document No.31, 3rd page, and the amount credited in favour of the defendant is \$11,781.97. At least 16 of those items can be cross-checked with the statements as contained in Exhibit B. I am not satisfied accordingly on the balance of probability that this claim of the Defendant can be allowed.

**Note 11 and 12:**

The Plaintiff has accepted the dispute of the Defendant under these two categories and accordingly had waived its claim.

**Note 13:**

I accept that items 16,17,18,46,48,56,61,65,66 and 67 have been waived by the Plaintiff. Item 15 and 146 have not been waived. Document No. 119 of Exhibit A shows the debit note in respect of item 15. No evidence has been produced by the Defendant to show that this debit note is incorrect. In respect of item 146, document No.86 (Exhibit A) shows that the invoice was made to the Defendant. There is no evidence to show that it was made to other customers. The dispute accordingly is dismissed in respect of those two items.

**Note 14:**

The explanation provided by Mr Wells as to the issue of the invoices under this dispute which did not bear the signatures or mark of the Defendant, in my view is satisfactory. Mr Wells explained that these invoices related to the purchase of fuel by the Defendant from Solomon Motors, when its ship, the Island Trader took fuel in Honiara. The defendant was a customer of the Plaintiff and accordingly, it was invoiced by Solomon Motors as a paper sale by the Plaintiff. The Defendant has not disputed this explanation or produced evidence to say that those amounts were not due.

**Note 15:**

The only audit shortages under this category are items 31 and 106, for the amounts of \$33,865.10 and \$2,546.31. I am satisfied these should be deducted from the total claim of the Plaintiff. The rest of the items under this category are valid claims of the Plaintiff.

**Note 16:**

I accept that the amount disputed has been waived by the Plaintiff.

**Note 17:**

I accept that this has been partly waived by the Plaintiff. The amount not waived is in respect of item 62 in Exhibit 'R' for the sum of \$198.40. Details of this invoice is contained in document No.11 of Exhibit A. No evidence has been adduced by the Defendant on the other hand to say that this amount is not owing. Accordingly this amount is a valid claim.

**Note 18:**

The claim is that there was a double invoicing of the Defendants in respect of item 77 in Exhibit 'R'. Under cross-examination, Mrs Radford stated that she was not so sure if the invoice was for exactly the same amount. When asked if she made any requests from the Plaintiff for the relevant documents to try and prove her case, she said that she did not do so. There is little evidence to support this claim and accordingly is also dismissed.

**Note 19:**

The amount disputed is for the sum of \$59,753.89. It is not disputed that this amount related to Mobil monies due from the Solomon Islands Government but wrongly banked by the Defendant into their account. This money does not come under the Debt Agreement. It is not money owing by the Defendant to the Plaintiff. It is money owing by Solomon Island Government to the Plaintiff. The Defendant had committed an error and therefore must make it good. There is no legal complication about this amount.

**Note 20:**

This related to item 98 in Exhibit 'R' for the sum of \$47.70. This amount has been waived by the Plaintiff.

**Note 21:**

I am satisfied with the explanation of the plaintiff's witness that the sum of \$8,097.91, which had been wrongly processed to the account of the Defendant in October of 1989, had been corrected by the Plaintiff by raising a G/R credit note and processing it to the account of the Defendant in August of 1990. I am satisfied this was done under G/R Credit note No.210044. This dispute accordingly must be dismissed.

**Note 22:**

The claim on this has been waived by the Plaintiff.

**Note 23:**

These were payments raised twice, and therefore had to be debited against the Defendant. For instance, in respect of item 123 in Exhibit 'R', for the sum of \$110,760.31, in the October 1989 statement, it was shown that a payment of \$141,899.64 had been credited in favour of the Defendant. This payment consisted of a number of individual payments, some of which were also credited to the account of the Defendant in November of 1989. Those individual payments are contained in document No.41 of Exhibit B. The payment of \$141,899.64 is contained in document No.40 in Exhibit B. There is no evidence from the Defendant to show that those individual payments were

not in fact double payments. Accordingly, the Plaintiff was entitled to reverse those individual payments totalling \$110,760.31, and this was what the Plaintiff did with that sum by raising a debit note No.D243 dated the 31/12/89.

The same thing applied in respect of item 144 for the sum of \$85,434.60. In document No.84 at page 1, of Exhibit A, the various payments processed to the February 1990 Statement of the Defendant were listed by the Plaintiff. At page three of document 84, is a copy of the Defendant's statement of account with the Plaintiff. That showed that in the March 1990 Statement, the same individual payments recorded in the February 1990 statement were repeated. As a result, a debit note No.D211017, dated 16/5/90, for the sum of \$85,434.60 was raised to the account of the Defendant in May of 1990. This is recorded at page 2 of the statement for the period May 1990. (see document No. 47 of Exhibit B.) There is no evidence produced by the Defendant to show that these debits were not proper. This dispute must therefore be dismissed as well.

**Note 24:**

The invoice in respect of item 126 of Exhibit 'R' was issued by Solomon Motors to the Defendant, for 33 empty drums at \$75.00 each. It is not disputed that this was correct. There is no proof from the Defendant that this amount had been paid or that it was a duplicate invoice. I am satisfied this dispute should also be dismissed.

**Note 25:**

This dispute related to items 157 and 158 of Exhibit 'R'. They were debts raised for dishonoured cheques. The evidence adduced at least in respect of one of those cheques was that it belonged to R. D. Plumbing & Hardware Company Limited, who was a customer of the Defendant. What this meant was that, when payment was made to the Plaintiff, it was credited to the account of the Defendant. The Defendant therefore gets the benefit of that cheque. When it is dishonoured, the Defendant loses out on the credit already given to it in respect of that cheque. The Defendant therefore has to be debited with the amount of that cheque. I am satisfied with this explanation and therefore must dismiss this dispute.

**CLAIM FOR COST OF 564 DRUMS:**

The defendant submits in respect of this claim that drums on arrival at the Depot are bought by the Defendant, and therefore belong to them. The Plaintiff accordingly has no claim over those drums, and what the Defendant does with them is of no concern of the Plaintiff. The Plaintiff on the other hand submit that the stock records show that there was a shortage of 564 drums at the Depot. What has not been shown by the Plaintiff however, is how the shortfall in those drums had been worked out, especially when it has not been disputed that the Defendant owned the drums on arrival at the

Depot. This claim accordingly has not been established to the required standard and must be dismissed.

**ALLOWABLE LOSSES:**

The rate allowed by the Plaintiff is 0.55% of the total number of litres that went through the Gizo Depot. Using the figures of 2,500,000 litres per year for 3 years and at the rate of \$0.81 cents per litre, the total allowable loss for leakages for 3 years is \$33,412.50. The evidence of Mrs Radford does indicate that there were losses due to leakages from the pipes, or defective equipment, and evaporation from the tanks. I am satisfied this figure should be allowed in favour of the Defendant.

**AMOUNT ALLOWED:**

The amount claimed by the Plaintiff as contained in Exhibit A(1) is \$620,369.15. The following amounts will have to be deducted to obtain the final amount of the claim as allowed by this Court:

(i)	Under Note 7, the sum of:	\$ 1,575.00
(ii)	Under Note 15, the sum of:	\$33,865.10
		\$ 2,546.31
(iii)	Cost of 564 drums:	\$56,400.00
(iv)	Allowable losses:	<u>\$33,412.50</u>
	<b>Sub-Total:</b>	<b><u>\$127,798.91</u></b>

The final amount of the claim of the Plaintiff allowed by this Court accordingly is \$492,570.24, and judgment is accordingly entered for this sum.

**INTEREST:**

I am satisfied interest should be paid on the judgment sum. The issue before me however is, what rate of interest would be appropriate. The Plaintiff submit that the commercial rate of interest would be applicable, and cited the case of Tate and Lyle Food and Distribution Ltd v. Greater London Council and Another (1981) 3 All E R 716, in support of their submission. An important point brought out in the judgment of Forbes J. at page 722 paragraph d-e, is that interest should not be awarded against the defendant as a punitive measure for having kept the plaintiff out of his money, but should be considered more along the lines that it is all a part of the attempt to achieve restitutio in integrum.

In considering the circumstances surrounding the facts of this particular case, it is clear to me that by the time the Agency Agreement was terminated towards the end of October 1990, the amount outstanding had reached \$499,000.00 mark. Even as early as January of 1990, the amount outstanding was oscillating around the \$500,000.00

mark. The Plaintiff knew that such a large sum had been outstanding for some time and yet did not take any active steps to have the outstanding amount reduced to some acceptable level.

The delay in the payment of the amount outstanding has been caused by the fact that the parties have opted out to have their dispute settled by the court. The Defendant in my view should not be penalised for that. I am not prepared to accept the contention that the Defendant's counterclaim was more of a delaying tactic rather than anything of merit and substance. The claim for interest at the commercial rate is accordingly denied. However, I will allow interest at the statutory rate of 5% with effect from January of 1991.

Costs also allowed against the Defendants.

(A.R. Palmer)  
JUDGE