

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA157/07
[2008] NZCA 167**

BETWEEN	IVAN WEAVERS TYRE CENTRE LIMITED First Appellant
AND	I C & S E WEAVER Second Appellants
AND	GILL CONSTRUCTION CO LIMITED Respondent

Hearing: 5 June 2008

Court: Glazebrook, O'Regan and Robertson JJ

Counsel: P F Whiteside for Appellants
D J Clark for Respondent

Judgment: 13 June 2008 at 3 pm

JUDGMENT OF THE COURT

- A The appeal is dismissed.**
- B Costs to the respondent of \$6,000 together with usual disbursements.**
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REASONS OF THE COURT

(Given by Robertson J)

Introduction

[1] The first appellant Ivan Weavers Tyre Centre Limited (“Weaver”), a tyre company in which the second appellants (Mr and Mrs Weaver) were the directors and shareholders, supplied, fitted and maintained tyres on a fleet of vehicles operated by the respondent, Gill Construction Co Limited (“Gill”).

[2] Proceedings were commenced in the High Court in 2002 alleging that, over a period of nine years from April 1992 until March 2001, there was a discrepancy of approximately \$1.5 million between the tyres invoiced and paid for by Gill and the tyres actually supplied to it by Weaver.

[3] The case was eventually heard by Wild J in March 2007. He encapsulated Gill’s claim at [2] of his judgment as follows:

Gill’s allegation, reduced to its bald practicalities, is that Weaver systematically swindled it over at least 10 years by routinely invoicing it for more tyres than it supplied to Gill.

[4] Gill pleaded five causes of action in the High Court, namely:

- (a) Breach of contract;
- (b) Deceit;
- (c) Breach of the Fair Trading Act 1986 (alleging that Weaver’s conduct was misleading);
- (d) Bailment (alleging Weaver had warehoused tyres as a bailee under a contract of bailment with Gill and that the tyres bailed and invoiced had not been rendered to Gill); and
- (e) Breach of fiduciary duty.

[5] To the forefront of the pleadings were the fourth and fifth causes of action, upon both of which Wild J found Weaver liable. He stated, however, that he would have been prepared to find against Weaver on all five causes of action.

[6] In respect of Mr and Mrs Weaver personally, the Judge found that they had procured deceit by Weaver, and that they had instrumentally participated in perpetuating Weaver's breach of its fiduciary duty to Gill.

[7] A number of grounds of appeal were initially flagged for this Court's consideration, but by the time of the hearing the issues had been markedly curtailed.

[8] Weaver acknowledges that it was a bailee for Gill and that there was a fiduciary relationship between Weaver and Gill, but contends that there was no breach of either.

[9] Mr and Mrs Weaver contend that there was no evidence to support Wild J's finding of deceit against them personally.

[10] Both appellants submit that the report of a forensic accountant, Mr Hooft, which was the central evidence at trial, was insufficient to justify Wild J's findings, or justify the level of damages awarded to Gill. They also argued that there was a flawed approach to the calculation of interest on the damages award.

[11] The issues on appeal, therefore, are:

- (a) Was there proper evidence of a breach of bailment and/or fiduciary duty by Weaver?
- (b) Was there an evidential basis for a finding of deceit?
- (c) If the answer to either (a) or (b) is 'yes', was Wild J correct to hold Mr and Mrs Weaver personally liable?
- (d) Was the quantum of damages ordered properly proved?; and

- (e) Was the Judge's approach to interest on damages within his discretion?

The case in the High Court

[12] Gill presented its case in the High Court on the basis of a mutually supportive package of evidence, made up of: invoices in respect of tyres bought and sold by Weaver and bought by Gill, industry data, and data on Gill's financial performance during and after its business relationship with Weaver. The particulars of those factors were:

- (a) Mr Hooft's compilation and assessment of the invoices in respect of certain types of new and retreaded tyres which were acquired by Weaver, together with invoices in respect of those same types of tyres which were charged to Gill. The available invoices showed that, in respect of five types of new tyres, Weaver acquired 815 stock units between 1993 and 2001, and in respect of retreads of the same types, they acquired 2,485 units. In respect of those same new tyres and retreads, the available invoices showed that the quantities invoiced to and paid for by Gill were vastly in excess of what was acquired by Weaver. (This was without taking into account the fact that, although Gill was unquestionably the largest client of Weaver, it was not the only client.) The number of stock units recorded as sold to Weaver customers for new and retreaded tyres were 2,302 and 3,606 respectively, so the disparities were 1,487 (in respect of new tyres) and 1,121 (in respect of retreads);
- (b) statistical data on average expenditures across the trucking industry for the costs of tyres as ratios of other fixed charges incurred by industry players, and compared to charges incurred by Gill. This was information compiled by Mr Hooft as "benchmarking data" and included the following percentages:

- (i) on average, tyre expenses are approximately 3.25 per cent of turnover, and over the claim period, Gill's average tyre expense was 5.5 per cent; and
 - (ii) on average, tyre spend is approximately 24 per cent of road user charges, and over the claim period, Gill's tyre spend averaged 56.04 per cent of its road user charges;
- (c) an assessment of Gill's financial performance by various measures during and after its contract with Weaver. This data mirrored the findings noted at (b) above, indicating that when Gill terminated its relationship with Weaver and switched its business to Firestone in 2001, there was a contemporaneous shift in its financial particulars, bringing it into line with industry averages. Specifically, the points noted under this head in Mr Hooft's report were that:
- (i) in 2002, Gill's tyre spend as a percentage of its annual turnover dropped to 2.57 per cent, from its 5.5 per cent average over the claim period; and
 - (ii) upon termination of its supply contract with Weaver, Gill's tyre spend as a ratio of its road user charges dropped to 24 per cent (for 2002 and 2003).

[13] At the conclusion of his report, Mr Hooft stated that, in light of his analyses, it was "more likely than not that Gill had been over-invoiced for tyres by Weaver and we estimate the value of that over-charging as being in the range of \$976,000 to \$1,018,000".

[14] Mr Hooft's report was the touchstone of Gill's evidence, and essentially the basis upon which Wild J found against Weaver. In light of the report's central evidential role (although Wild J also made some unfavourable credibility findings on Mr and Mrs Weaver), it was the subject of both formal and substantive attacks by Weaver's own expert accountant, Mr Lazelle.

[15] Two particular criticisms were levelled against the report by Mr Lazelle, both of which Wild J found to be satisfactorily disposed of by Mr Hooft's answers.

[16] First, Mr Lazelle argued that Mr Hooft's report was unsound because it was too simple and because it did not allow for gaps in the invoice records. Secondly, Mr Lazelle suggested that the discrepancies in the data analysed by Mr Hooft might be explained not as fraud but as "mis-coding errors", whereby non-tyre items supplied by Weaver to Gill were coded as tyres, distorting the true picture of actual tyre costs.

[17] As to the first of these criticisms, Wild J found no significance in the report's simple methodology, finding "overwhelming" proof of fraud in the convergence of each component of Mr Hooft's analysis. In addition, the Judge noted that gaps in invoice records would cut both ways: if invoices of purchase by Weaver were missing, the discrepancy would tend to be overstated, but if invoices of sale by Weaver to Gill were missing, the discrepancy would tend to be understated.

[18] As to the second criticism, Mr Hooft stated that mis-coding errors were an unlikely explanation because the level of overcharging was too great, and that it was significant that when it switched to Firestone, Gill's tyre expenditure halved. If mis-coding were the reason for the discrepancy, it must have been "suddenly and consistently" remedied post-2001 (at [93] – [94]). Wild J found Mr Hooft's evidence on this point to be "compelling".

[19] In addition to Mr Lazelle's evidence, Mr and Mrs Weaver offered nine explanations of their own, none of which Wild J found to possess any merit. Upon analysis, it is plain that Wild J was correct to dismiss each explanation as either "groundless or immaterial".

[20] The first four explanations were an attempt to demonstrate that tyres purchased by Gill might have been absorbed other than as business acquisitions, either because they were lost, used for credit in exchange for cash cheques or supplied to individuals and charged to Gill's business accounts. Wild J found each

instance cited by Weaver to pertain to so small a number of tyres as to be insignificant, and to be implausible in any event.

[21] Wild J found the fifth explanation, that Mr Tony Gill would sometimes do cash deals for tyres, to be of “neither relevance nor substance” (at [80]).

[22] The sixth and seventh explanations were that Gill incurred costs (either for fleet maintenance or other products supplied to it by Weaver), and that some of those costs might have showed up on the “tyre account” (at [81] – [84]). In cross-examination, it emerged that the incidents Weaver relied on for these explanations were, in addition to being immaterial, outside the claim period.

[23] The eighth explanation was that there were large gaps in the invoice records which might plausibly distort the nature of any discrepancy. In cross-examination it was accepted by Mr Weaver that the effect of missing invoices would be, in the case of purchases by Weaver, to overstate the discrepancy, and in the case of sale by Weaver to Gill, to understate the discrepancy. Overall, it would make no appreciable difference.

[24] The final explanation was that Weaver had a practice of purchasing “good second-hand tyres for cash and on-selling them to other customers on invoice” (at [87]). Wild J dismissed this explanation on the basis that Mr Hooft’s report was limited to new and retreaded tyres.

The issues on appeal

The basis of Weaver’s liability

[25] There was no dispute as to the principles of bailment and their particular application to this case. Those principles are summarised in *Wilson & Horton Ltd v Attorney-General* [1997] 2 NZLR 513 (CA), and they have an intuitive application to the facts of this case, in light of the parties’ “warehousing” arrangement. That arrangement involved Weaver warehousing, at its own premises, a stockpile of tyres

for Gill and replenishing that stock “as and when needed”. Weaver would invoice Gill for the warehoused tyres as they went into (or were claimed by Weaver to go into) stock. The nature of this arrangement was such that Gill did not view or exert physical control over each new stockpiled tyre. Reviewing the facts and circumstances of this case, Wild J held that a breach of bailment was made out because tyres Weaver held for Gill were supplied to customers other than Gill, and knowingly so.

[26] Mr Whiteside submitted that this finding was unsustainable as there was no evidence that tyres held by Weaver for Gill were actually supplied to other customers. In the absence of any demonstrated illegitimate physical transfer of Gill’s tyres by Weaver, there could be no basis for finding a breach of bailment.

[27] When the arrangement between the parties was terminated by Gill in 2001, Gill took all the tyres in the warehouse which were said, by Mrs Weaver, to be worth \$55,000 (a figure which was not challenged at trial). There was never a suggestion that there were more tyres which should have been handed over. Rather, Gill’s allegation was that many tyres had been charged to Gill which were simply never acquired by Weaver. Mr Whiteside submitted that given that this was the crux of Gill’s case, breach of bailment was an inappropriate cause of action, since as a matter of logic non-existent property cannot be the subject of a bailment.

[28] Mr Clark responded that Mr Whiteside had missed the point. On the invoices that were sent by Weaver to Gill, it was stated that tyres and retreads had gone into “stock”. The Court was entitled to take this documentary assertion at face value and infer from it that Weaver had in fact physically stocked those tyres on Gill’s behalf. The alternative was to accept there was an admission of deceit, and that Weaver had deceptively claimed certain items to have been stockpiled when they had not been.

[29] By virtue of this presumed bailment, therefore, Weaver was under an obligation to account for the tyres it claimed were in the warehouse for Gill. All Gill had to prove, to establish breach of bailment, was that Weaver had not accounted for the tyres in question.

[30] The Judge found that the appellants had not provided any sensible explanation as to what happened to the tyres that Weaver invoiced as “stock”. On this basis, he found the breach of bailment to be made out.

[31] As to the breach of fiduciary duty, Weaver submitted that at the termination of the Weaver-Gill contract what was “in stock” for Gill was delivered up, and no tyres were held back or missing. Gill countered this by arguing that it ignored the substantially unchallenged evidence of its accounting and financial expert, Mr Hooft, that from the litigation period a substantial number of tyres and retreads for which Gill was invoiced were non-existent or missing. It was therefore open to Wild J to find that Weaver’s duty had been “glaringly breached” because the fiduciary relationship had been used to extract a substantial sum of money for tyres that were never actually supplied.

[32] Mr Clark submitted that whether or not there was in fact a breach of bailment (it being accepted that there *was* a bailment, and, derivatively, a fiduciary relationship), is in large part an academic dispute. That must be correct. If Gill’s evidence is accepted, it does not matter whether or not Weaver acquired tyres on Gill’s behalf and then improperly sold them to third parties, or deceptively invoiced Gill for tyres that it never acquired at all. In either case, Weaver deceived Gill by fraudulently charging it for tyres that were never given, or available to be given, to Gill, and its liability for deceit is substantially the same as it would be if the basis of liability was breach of bailment or breach of fiduciary duty. Whether Weaver breached a bailment (and corresponding fiduciary duty) or simply deceived Gill, the losses on Gill’s part and the fraudulent gains on Weaver’s part were the same.

[33] The factual circumstances of this case are unique. Gill placed an extraordinary degree of trust in Weaver. The fact that representatives of Gill indicated that they did not require annual stock-takes speaks volumes as to their trust and confidence in Weaver. Although some tyres were immediately delivered to Gill to meet its demand, a substantial part of its supply was warehoused by Weaver. The opportunity for Weaver to abuse the arrangement was considerable.

[34] Wild J was satisfied to dispose of the case on the basis of his findings in respect of breach of bailment and breach of fiduciary duty. So overwhelming did he find the evidence against Weaver on those two causes of action alone that he did not enquire beyond them for the purpose of awarding Gill damages. But the inevitable conclusion from his factual findings is that, even if no breach of bailment or fiduciary duty is made out (for the reasons given by Mr Whiteside (noted at [27] above)) Weaver is still liable to Gill for deceit.

[35] We accept the logic in Mr Whiteside's argument that breach of bailment was not, on the evidence before Wild J, convincingly made out, but we are in no doubt that Weaver is, as a logical parallel to Mr and Mrs Weaver's personal liability in deceit, also liable in deceit. We address deceit below in terms of Mr and Mrs Weaver's personal liability. But, that liability was for procuring and perpetuating deceit by Weaver, and therefore the same liability attaches to Weaver itself.

Gill's conduct

[36] Mr Whiteside submitted that it was significant that Gill was lax in its accounting and finances and that Gill could have been more prudent.

[37] It was common ground that Gill was less involved in, or aware of, its own accounts and cash-stock-flow than it might have been. Wild J found that "a complete lack of internal checks and controls by Gill is a notable feature of this case, explaining how Weaver was able to overcharge as much as it did, for as long as it did".

[38] However, as hands-off as Gill's accounting may have been, and whatever the state of its internal control mechanisms, that does not excuse deception or fraud by Weaver, or by Mr and Mrs Weaver. In cases of dishonesty, it is no argument that a plaintiff was careless. The Supreme Court in *Amaltal Corporation Ltd v Maruha Corporation* [2007] 3 NZLR 192 has stated that:

[23] ... it is no excuse for someone guilty of fraud to say that the victim should have been more careful and should not have been deceived.

[39] *Amaltal* involved deception of one company by another when both were engaged together in a joint venture. The deceptive company, Amaltal, prepared the accounts for the joint venture, and failed to tell Maruha that it could claim particular tax deductions. In Maruha's ignorance of its entitlements, Amaltal transferred the money in question to itself and gave a false explanation to Maruha when questioned about the transfer. The Supreme Court found that, even though Maruha had its own "watchdog", who could have been more diligent, that fact did not deprive Maruha of its entitlement to put faith in its joint venture partner.

[40] It is clearly no defence for Weaver, or Mr and Mrs Weaver, to claim any benefit from Gill's less than scrupulous accounting. Where fraud is established, carelessness on the part of the victim provides no excuse.

[41] Mr Whiteside has suggested that the availability of opportunities for Gill staff or directors to have checked the tyres it was actually getting against what it was being charged for suggests that fraud at the level implied by Mr Hooft's analysis was highly improbable. That is clearly not how the Judge assessed the position and his conclusion was open on the evidence. The Judge has not been shown to be wrong. The ostensibly incredible extent of the fraud does not compel the conclusion that it did not in fact occur.

The evidence in this case

[42] Because of the way in which the Gill-Weaver relationship had operated over the nine years of the claim period, the approach to proof of Gill's alleged losses called for special care. Had Gill's case consisted wholly of an analysis of germane industry figures, or wholly of an analysis of available invoices, or had been solely dependent on Gill's drop in tyre spend after its move to Firestone, there may have been room for argument that there had not been proof on the balance of probabilities even allowing for the seriousness of the allegations made.

[43] The strength of Gill's case was the total effect of the evidence. In addition to the combined persuasiveness of Gill's three evidential components, the Judge was entitled to have regard to the quality of Weaver's response to Gill's allegations. This

was not to alter the legal burden of proof, or to require Weaver to establish its lack of blameworthiness, but the combined effect of Gill's evidence cried out for an explanation. The nine explanations that Weaver proffered did not meet Gill's case head-on, but nipped around its edges. In any event, none was found to have any strength or validity.

[44] We have no doubt that Wild J's conclusion on Weaver's liability was well and truly available on the evidence. It is not easy to envisage how it could have been avoided.

Liability of Mr and Mrs Weaver

[45] In the present case, Wild J found that Mr and Mrs Weaver procured the deceit committed against Gill by Weaver. Although the over-charging invoices were issued by Weaver, Mr and Mrs Weaver were personally involved in their company's accounts (at [118]).

[46] Further, the warehousing arrangement, which Wild J found to be an idiosyncratic feature of this case, gave Mr and Mrs Weaver a unique degree of control over Gill's tyres and a large amount of discretion over stocking, checking and re-stocking. The fact that the warehousing arrangement was not par-for-the-course for Weaver customers, but limited to Gill, suggests that the arrangement between the two businesses was "special".

[47] More compelling on these facts, however, is the approach of Cooke P in *Watson v Dolmark Industries Ltd* [1992] 3 NZLR 311 (CA). That involved deception of the appellants by Mr Davies, the substantial shareholder and director of Dolmark. Dolmark was found to be in breach of its fiduciary duty to Watson, and the Court of Appeal found that Davies was not only "knowingly implicated" in his company's breach of its fiduciary duty, but was its "instigator". Cooke P said at 316:

... as against the second respondent also the appellant is, in my view, entitled to an accounting for lost royalties on the ground that he was knowingly implicated in his company's breach of fiduciary duty. Indeed he

instigated it. It is perhaps the clearest possible case of knowing assistance. A case of personal dishonesty of this kind is distinguishable from the question whether the owner of a one-man company comes under a duty of care.

[48] On the basis of Wild J's evidential findings – crucially, that Mr and Mrs Weaver were personally involved in the Gill accounts – it was open to find that they were knowingly implicated in procuring and perpetuating Weaver's deceit. To the extent that they were personal instigators (and perpetrators) of the fraudulent over-charging by way of Weaver invoices, they are within the approach in *Watson v Dolmark*. Further, this Court has affirmed the proposition that company directors who have committed intentional torts are personally liable for their wrongs. That is so when a director has committed a wrong in their capacity as a natural person, even though the wrong also attaches to the company procured to commit the wrong by that director: *Winchester International (NZ) Ltd v Cropmark Seeds Ltd* CA226/04 5 December 2005.

[49] In addition, we are satisfied that if Weaver is liable for breach of its fiduciary duty to Gill, then Mr and Mrs Weaver are concurrently liable. Weaver owed a fiduciary duty to Gill, in large part because it warehoused Gill's tyres. Mr and Mrs Weaver, by means of Weaver, deceived Gill with fraudulent invoices. They were substantially responsible for the running of Weaver, and each of them had unfettered access to, and control over, the company's accounts. They also had control over Gill's tyres. Gill depended on Weaver for all its tyre needs, and had minimal internal checks and controls in place, such was the trust it placed in Weaver. Prior to Mr Tony Gill, his father, Mr Bill Gill, had headed the company and he had enjoyed a close friendship with Mr Weaver. This personal history between Gill and Weaver is a special feature of this case, and was noted by Wild J (at [6] – [11]).

[50] The circumstances here are compelling to render Mr and Mrs Weaver personally liable for the fraud committed in the name of their company and procured and perpetuated by them.

[51] There was a proper evidential base for finding Mr and Mrs Weaver personally liable for the wrongs committed by Weaver because of their intentional deceit, and the degree to which they effected Weaver's breach of its fiduciary duty.

The quantum of the order

[52] In the High Court, Mr Hooft estimated that the loss suffered by Gill was between \$975,956 (by analysing the invoices) and \$1,017,849 (by analysing the benchmarking data). The former was the sum claimed by Gill, and Wild J made a contingency deduction of ten per cent, reducing the final award to \$878,360 (at [128]).

[53] Before us, Mr Whiteside submitted that this quantum was unsustainable, as:

- (a) The Hooft report was too simplistic to permit a precise damages quantum to be drawn from it; and
- (b) the ten per cent contingency allowance was too modest.

[54] We have found no sound basis on which to impugn the methodology or the data of the Hooft report. The report's punch came from the convergence of its various conclusions, all of which pointed at a substantial fraud by Weaver. The report's methodology was simple, but it was not simplistic. The variety of data analysed, and the manifest discrepancies that it highlighted, make it a solid evidential basis from which to infer both the fact of Weaver's liability, and the extent of that liability. Wild J was correct to rely on the Hooft report for his quantum starting point.

[55] We are satisfied that the quantum of loss indicated by the figures in the Hooft report is not compromised by the fact that Gill was not Weaver's only customer. Although Weaver had business with other customers, Gill was by far the largest purchaser. To illustrate, of the 950 new IIR tyres purchased between 1993 and 2001 by Weaver customers, 762 were purchased by Gill. Of the 1,724 IIR tyres purchased between 1993 and 2001 by Weaver customers, 1,188 were purchased by Gill. These proportions indicate that sales to other customers can be disregarded for the purpose of assessing trends in Weaver's purchase and on-sale of tyres. Further, and critically, Gill was the only customer for which Weaver warehoused tyres. All other customers purchased tyres only as and when required, and those tyres were

physically delivered up right away. The discrepancies highlighted in the Weaver accounts can therefore attach only to its dealings with Gill.

[56] Ten per cent was deducted for contingencies. We find no basis to differ from that allowance. There were missing invoices, such that some allowance was required to reflect the uncertainty of Gill's loss. But, the effect of the missing invoices for Weaver's purchases from its suppliers would be to overstate the loss to Gill, and the effect of missing invoices for Gill's purchases from Weaver would be to understate the loss. In light of the fact that there were missing invoices on both sides, there was no need to make an allowance that wrote off all losses to Gill for the period for which the data was missing. To do so would ignore the counter-balancing effect of the two classes of invoice on the apparent discrepancy. Wild J's ten per cent deduction adverted to the uncertainty generated by the missing invoices, without allowing Weaver to benefit improperly from gaps in the available data.

[57] There were no grounds to interfere with Wild J's damages award.

The approach to interest

[58] When this case is looked at in its entirety, it is a simple situation of Gill, over an extended period, being charged and paying for stock that it did not receive. The Judge took a broad-brush approach. He assumed that the loss had been consistent over the period. In the circumstances of the case that was a clearly available course. All Wild J did was to award interest on annual rests on money which Weaver received but to which it had no entitlement, and for which Gill was out of pocket without benefit.

[59] That is the very purpose of interest. The approach adopted was thoroughly justified and within discretion.

[60] We acknowledge that, over the nine year period, the interest is substantial, but that arises from the extensive fraud committed, and does not detract from the propriety of the Judge's approach to interest.

Result

[61] Mr Whiteside, who was not counsel in the High Court, has analysed and argued his client's case with care and skill and has raised every possible challenge available to Weaver.

[62] However, we are satisfied that the decision of the High Court is unimpeachable and the appeal in all its facets is dismissed.

[63] There is no basis on which costs should not follow the event. There will be an award against the first and second appellants jointly in the sum of \$6,000, together with usual disbursements.

Solicitors:
Wynn Williams & Co, Christchurch, for Appellants
Wisheart MacNab & Partners, Blenheim, for Respondents