REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

27/5/2013

CASE NO 2012/A5052

IN THE MATTER BETWEEN:

N&Z INSTRUMENTATION AND CONTROL **APPELLANT/PLAINTIFF**

AND

TROLEX S.A. (PTY) LTD **RESPONDENT/DEFENDANT**

JUDGMENT

SUTHERLAND J:

INTRODUCTION

1. The Plaintiff, N & Z Instrumentation (Pty) Ltd (NZ) wants the defendant, Trolex SA (Pty) Ltd (TSA) to pay it R 1,413,543.56 as a commission in respect of a sale of goods by TSA to GFI mining (Pty) Ltd at its Beatrix mine. The claim is based on the terms of an agreement alleged to exist between TSA and NZ.

2. The alleged agreement provided that NZ would have exclusivity within certain parameters to distribute the products of TSA and that if TSA sold to customers within the zone of exclusivity an obligation upon TSA existed to nevertheless pay to NZ a commission of 40 % of the selling price to end-user. Because it is alleged that Beatrix mine was in the zone of exclusivity, the 40 % commission became payable and that sum is R1,413,543.56. Furthermore, based on this alleged obligation of TSA, NZ wants TSA to account for all its transactions to determine if other sales occurred which would attract such a commission.

3. TSA is a subsidiary of Trolex Ltd (TUK). TSA is a small sales operation whose function it to secure orders placed on the TUK factory in Stockport, England. Its local staff consisted of the manager, Jacques Maartens and a business development officer, Zia Hutton (Joubert by the time of trial) whose function was the backroom administration. There were two other staff, who, it is presumed, performed sales and after sales roles; they play no role in the case. There were no resident directors in South Africa. According to Maartens his authority did not include contracting on behalf of TSA outside of sales transactions.

4. Trolex is a manufacturer of sophisticated instruments for use in health and safety applications, especially in mining applications, such as toxic gas detectors and the like.

During 2007 Peter Dawson was the TUK managing director and in 2008 he was succeeded by John Pierce-Jones. During 2007 -2008 Ken Dawson was the global sales Director. David Green was the financial director.

5. NZ is a distributor and reseller of industrial instruments, mainly in the general industrial market, whose managing director is Rod Glatt. It has a sales network throughout South Africa and imported, or bought goods locally, to supply end-users and derives its income from marking up the price of goods so procured and on-sold.

6. It is NZ's case that:

6.1. an oral agreement was concluded on 4 December 2007 between Glatt, and Ken Dawson which provided for:

6.1.1. a sole distributorship for NZ of Trolex goods throughout all Southern Africa except for certain limited markets where TSA was already active, and

6.1.2. a discount to NZ on Trolex products of 20% of the selling price to end users.

6.2. Further, on 9 April 2008, Green and Glatt agreed to increase the discount rate to 40% of selling price to end user.

7. Trolex denies any agreements as alleged were concluded, despite negotiations towards an agreement to regulate a distributorship. It is not Trolex's case that it did not want a distributorship agreement. Ultimately, it contends, the main reason for not concluding such an agreement was the insistence by NZ that a discount of 40 % was necessary to undertake the business. This rate, so Trolex says, was beyond reach as it denuded profit accruing to Trolex to such a degree that it was not viable.

8. The presentation of the case for Trolex was complicated by the fact that its two witnesses Ken Dawson and Green were based in England and they had no first hand or overall knowledge of exactly what occurred in Johannesburg. Maartens and Hutton, both ex-staff of TSA and both having left TSA under circumstances of disaffection, testified in support of NZ's version of events. It is Trolex's case that Maartens did various things either without authority or in defiance of instructions to the contrary. The reliability of these two witnesses was challenged and the weight and credence to be accorded to their testimony requires specific attention, a matter addressed hereafter.

THE CRITICAL ISSUES

9. The critical issue upon which the case turns is whether or not there was an agreement in the terms alleged, as summarised in paragraph 6 of this judgment, or at all. Three draft contracts were produced, the first and third by Glatt, and the second by Maartens. The enquiry must plumb the evidence to decide whether, despite the vain attempts to secure a written agreement, a genuine anterior oral agreement came into being or the parties were simply engaged in protracted negotiations which did not mature into a binding agreement. Self evidently, the *ipse dixit* of the witnesses, one way or the other, is not itself helpful; rather, a scrutiny of the contemporary expressions of the parties must be examined to assess the probabilities of the truthfulness or accuracy of the respective assertions.

10. It is common cause that, in the plethora of documentation which passed between the parties between October 2007 and July 2008, consisting of emails and drafts of agreements, there is no unequivocal acknowledgment of an agreement in the terms alleged by NZ. NZ's case, on appeal, is that a traverse of the communications and an examination of the parties conduct demonstrates, that on the probabilities, such an agreement, as alleged, did indeed come into being. The argument is founded entirely on

inferences to be drawn from allegations of fact, of which some are in dispute. The essential contention, on behalf of NZ, is not that the correspondence evidences an agreement as alleged, but rather that, properly construed, it constitutes powerful corroboration of the testimony tendered that an oral agreement was concluded on the terms alleged, and on that footing, the denial by Trolex of such an agreement is to be disbelieved.

11. Further, it is common cause that during the period between February 2008 and about July 2008, several quotations were issued by TSA to NZ which reflect a 20% and later a 40% discount. Also, after the 9 April meeting, at which it is alleged the rate was revised, there is evidence that the official price list was amended to reflect special prices to NZ; an 'old' price of 20% and a 'new' price of 40 %. NZ invokes this course of dealings as corroboration of an agreement on these prices. This contention is addressed hereafter.

12. The trial court addressed the same conspectus of issues and concluded that, on the evidence adduced, a case had not been proven that an agreement, as alleged, had been concluded. Almost all the factual findings of the trial court are challenged for want of properly weighing the probabilities. As with all evaluations of factual disputes, within the totality of the given saga there can often be found to exist some *inducíae* which *could* point towards or away from the proposition at stake. An examination of the relevant events requires a holistic approach in order to determine whether the onus on a plaintiff to prove its alleged contract is tipped in its favour.

The Law about determining the existence of consensus by businessmen

13. As part of the argument on behalf of NZ, it was advanced that the paradigm within which the events fell to be adjudged was that of the parties reaching an oral informal contract

which was not made subject to a requirement for enforceability to be reduced to writing and when they did move to contemplate writing it was indeed to be a mere recordal. Then, as matters developed, they modified the original terms as to price, but the original oral contract was never compromised.

14. In the decisions of **Pitout v North Livestock Co-Operative Ltd 1977(4) SA 842 (AD)** and of **CGEE Alsthom Equipments et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd 1987 (1) SA 81 (AD)**, the Supreme court of appeal had occasion to address the problem of messy agreements in the course of protracted negotiations. In **Pitout** it was emphasised that the question turns on the particular facts of the case(at 850D). The court alluded to the example illustrated in **OK Bazaars v Bloch 1929 WLD 37**, where notwithstanding agreement on the price for the sale of shares, so held the court, the appreciation that there were other aspects not discussed when the price was agreed that would have to be discussed and agreed, meant no binding agreement had been concluded. Reference with approval is made to **Williston on Contracts, 3rd ed, vol 1, sec 27 p61,** and at 850F the court cites the following:

> " Frequently negotiations for a contract are begun between parties by general expression of a willingness to enter into a bargain upon stated terms and yet the natural construction of the words and conduct of the parties is rather that they are inviting offers or suggesting the terms of a possible future bargain, than making positive offers"

15. In the **Alsthom case**, the parties were in exhaustive and protracted negations which involved the revision and re-revision of the specifications of the project. Pressure by Alsthom the sub-contractor to GKN Sankey to procure a commitment built up. A telex was sent to Alsthom saying the tender had been awarded. Later the contract was awarded to another company. Notwithstanding the telex there were important matters outstanding

on anyones' version. However, upon a holistic appreciation of the to-ing and fro-ing manoeuvres of the parties, the court held that the balance was tipped in favour of a binding agreement. At 92B - E it was held that:

> 'There is no doubt that, where in the course of negotiating a contract the parties reach an agreement by offer and acceptance, the fact that there are still a number of outstanding matters material to the contract upon which the parties have not yet agreed may well prevent the agreement from having contractual force. A good example of this kind of situation is provided by the case of OK Bazaars v Bloch (supra) (see also Pitout v North Cape Livestock Co-operative Ltd (supra)). Where the law denies such an agreement contractual force it is because the evidence shows that the parties contemplated that *consensus* on the outstanding matters would have to be reached before a binding contract could come into existence (see *Pitout's* case *supra* at 851 B-C). *The existence of such outstanding matters does not, however, necessarily deprive an agreement of contractual force.* The parties may well intend by their agreement to conclude a binding contract, while agreeing, either expressly or by implication, to leave the outstanding matters to future negotiation with a view to a comprehensive contract. In the event of agreement being reached on all outstanding matters the comprehensive contract would incorporate and supersede the original agreement. *If, however, the parties should fail to reach agreement on the outstanding matters, then the original contract would stand.* (See generally Christie, The Law of Contract in South Africa at 27 - 8.) Whether in a particular case the initial agreement acquires contractual force or not depends upon the intention of the parties, which is to be gathered from their conduct, the terms of the agreement and the surrounding circumstances (see Pitout's case supra at 851D-G). I did not understand counsel to dispute the correctness of these general propositions.
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> (Emphasis supplied)

16. Instructive in regard to this problem is the decision of Heher J (as he then was) in **Titaco Projects (Pty) Ltd v AA Alloy Foundry (Pty) Ltd 1996 (3) SA 320 (W).** In that matter, the parties were in dispute about whether a binding contract had come into being.

17. Titaco had agreed to supply certain industrial shoes for a smelter to its customer. It subcontracted the manufacture to AA Alloy. The shoes were not up to standard, and the customer looked to Titaco and Titaco looked to AA Alloy to make good. A settlement agreement was pursued by Titaco and AA alloy which had as it aim the re-supply of

shoes that would meet the customer's requirements. For the moment all was well. Then the customer put up new and stringent specifications. AA alloy protested that its agreement to resupply to the customer's specifications was subject to AA Alloy accepting the new specifications. This was taken by Titaco as a repudiation and the litigation ensued.

18. Heher J approached the question from the point of departure that the evidence had to demonstrate an intention to contract through matching offers and acceptance (at 331D). The intentions of the parties were to be sought by examining their 'contemporaneous conduct' (at 331F). The reference to the initial agreement being 'in principle' was an important benign assumption that the remaining details outstanding after a 'framework' had been agreed did not justify a finding that a binding agreement, absent the refinements, had been achieved . Citing the passage from the **Alsthom Case** mentioned above, Heher J concluded that on those facts an application of the **Alsthom Case** outcome was not applicable. He went on to observe at 337B:

> "The second insuperable obstacle to the success of the appeal is the absence of the substance necessary to constitute an enforceable contract. Inherent in the *Alsthom* judgment (at 92E) is the qualification that unless the terms upon which a party relies for the supposed agreement have an independent meaningful existence (ie divorced from any terms left over for later negotiation), there is scant possibility, if any, of deciding that a binding agreement has come into being. See also *Kenilworth Palace Investments (Pty) Ltd and Another v Ingala and Another* 1984 (2) SA 1 (C) at 11F-G.

19. And further at 337G - 338F;

> "It is not helpful to reason that because the Court in the *Alsthom* case found that the updated technical specification was still an unresolved subject for debate after 25 June 1979, but nevertheless concluded that the parties had on that date reached *consensus*, so ought we also to find that the unresolved copper specification provides no obstacle to effective agreement. The cases

differ *toto caelo*. In *Alsthom*, the acceptance came at a time when the contractual framework was secure enough to enforce the agreement. The appellant in that matter chose to bind itself without ensuring that its will prevailed in relation to the outstanding issues. None of those issues was apparently so fundamental as to render the agreement vague in its terms as a result of its absence. That is not the case here; there is no contractual framework in the form of a tender into which life can be breathed by performance; the purity of the metal to be used in the manufacture was the root of the previous difficulties. Simply to have agreed that the replacement shoes were to be made of copper was, in the context of the proposed subcontract, only a preliminary step insufficient to implement manufacture of the shoes. The witnesses (and counsel) conceded as much. The qualification which I find in the *Alsthom* judgment is also consistent with the established principle that an agreement to negotiate has no exigible content. That the outstanding issues could very easily be overcome by parties acting reasonably or that the parties, at the time of their agreement in principle, foresaw no difficulties in reaching *consensus* in the future is irrelevant: cf *OK Bazaars v Bloch* 1929 WLD 37 at 42. The only way in which the plaintiff could have made the ease of achieving future agreement part of its case was by pleading tacit terms, a route which it chose not to follow. Even if the facts justify the inference that the parties were satisfied that they had reached an agreement which was binding and acted accordingly, that could not create an agreement where one did not exist: *Kenilworth Palace Investments (supra* at 11H-12B). The Court will not make a bargain for the parties if, although they thought they were contracting, they nevertheless failed to reach an agreement on an important term of their proposed bargain: *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd*1964 (1) SA 669 (W) at 676B. It does not help to reason, as the plaintiff's counsel has done (and as the learned trial Judge accepted as a probability in favour of a binding agreement), that the second stage of the agreement had no point without agreement on the first. Agreement in stages certainly does not mean that *consensus* at the first of those stages is legally enforceable.

20. The upshot is that the enquiry is holistic and unmechanical.

A CRITICAL NARRATIVE OF THE MATERIAL EVENTS

21. The analysis that follows is principally chronological, but ties in prior or subsequent events and assesses the probabilities of aspects of the versions in the course of the narrative. The documents introduced into evidence are referenced by square brackets.

Pre- 4 December 2007

22. In 2007 the parties were total strangers to one another and had no trading history whatsoever. Glatt says he came to hear of Trolex. He initiated contact, by email and telephone with Peter Dawson in England. They discussed the prospect of NZ selling Trolex products. These exchanges culminated in by visit by Glatt to TSA at its Johannesburg offices and then on 22 October 2007, after Glatt had ostensibly sent information about NZ to TUK, Peter Dawson suggesting NZ sell Trolex products to test the local market. He added that he would send the sales manager to Johannesburg to do training on Trolex products he requested. Glatt at once invited such a visit. By this time, if not before, NZ was made privy to the limited sales development capacity of TSA which addressed only a segment of the coal mining market. Apparently, before 4 December one transaction only was initiated.

The meeting of 4 December

23. Ken Dawson, whilst in South Africa to address other business, also visited NZ with Maartens and addressed the sales team on Trolex products. After that, at NZ's offices, a business relationship between NZ and Trolex was discussed between Ken Dawson and

Glatt. What else happened is disputed. The evidence about the happenings was primarily commentaries on the subsequent emails of 7 December 2007 which alluded to the meeting. Glatt, in evidence, bolstered by Maartens in certain respects, says an agreement, in the terms alleged, was sealed. Ken Dawson denies that flatly.

24. It was argued that by 4 December the parties were in an advanced stage of negotiations. This is an exaggeration. The superficial prior contact, as alluded to above, and as later described in a letter of 23 July 2008 by Glatt, belies such an idea. Further, it was argued that TSA lacked capacity to expand the Trolex market and NZ could rescue it from stagnation. This idea is advanced to suggest that, on the probabilities, Trolex grasped a golden opportunity to jump into bed with NZ. The value to Trolex of the opportunity presented by a relationship with NZ may be true, but is not of great significance: it represents no more than the *sine qua non* for contemplating a co-operative arrangement, not a factor that enhances the probability that a contract as alleged was reached. Indeed, the terms alleged were onerous and unattractive to Trolex, to say the least, a consideration that enjoys attention elsewhere.

25. Ken Dawson says his visit to NZ on 4 December 2007 was to perform a routine presentation to a potential agent, a task he had undertaken many times before. It was relatively brief. Whether the activity he engaged in is called a "presentation" or "training" is inconsequential. He says he did not come to seal an agreement, but to introduce Trolex and its products to NZ. He was himself ignorant of the South African market or its potential for Trolex products. Ken Dawson says in evidence that he came away from the meeting of 4 December having asked for a plan of sorts, a sales strategy to assess the way forward. Such a request seems an obviously probable event: ie any supplier abroad would

want to know how a brand new agent might break into untapped markets. No such plan ever materialised from NZ.

26. The emails exchanged by Glatt and Peter Dawson on 7 December cannot, in my view, be read in a way to suggest more than what Ken Dawson says happened. Glatt's own email [1512] addressed to Peter Dawson, reports on Ken Dawson's visit as a 'good presentation' and an 'overview' and expresses 'keenness' to 'work with Trolex'. Glatt lists issues that were 'discussed' and does so in the form of questions yet to be answered rather than as matters which were resolved. Absolutely nothing is mentioned about pricing. In three of the five listed points, Glatt, tautologously, in faintly imploring tones, asks about assurances that Trolex will not cut out NZ once a market demand has been developed. In all of this email there not a smidgen of an allusion to an agreement on anything resembling the terms alleged by NZ to found the claim.

27. Peter Dawson's immediate reply was penned before Ken Dawson's return to TUK. He notes having had interim reports from Ken Dawson and alludes to the 'market potential' thought to exist in South Africa. He adverts to the risk of crossover sales by Trolex and NZ and says that 'we *will need* to agree who goes where', asserts that Trolex is run by ethical chaps, boasts of thirty healthy agency relationships elsewhere in the world and concludes by saying that Trolex and NZ need to 'be comfortable with any arrangement *that we propose*'. Of no little significance, he invites Glatt to initiate an agreement for signing.

28. Notwithstanding the absence of any reference to an agreement, still less to the terms now alleged by NZ, according to Glatt, Ken Dawson and he shook hands on a firm and binding agreement which included both a discount of 20% of the Trolex selling price and

the right to mark up a further 20% on the NZ customer price, and exclusivity over markets not being tapped by TSA. The pleadings misrepresented the price allegedly agreed to as 40 % of Trolex selling price at this date, an error which Glatt acknowledged and retracted. How he could have allowed the case to be pleaded as it was is not explained, still less how he could verify the cause of action under oath in a summary judgment affidavit. Maartens went along with Glatt's version but struggled to contribute any substance about any exchange on the terms supposedly agreed, and rather, tended to fixate on the handshake.

29. In my view, Glatt's version is simply unsustainable. The monumental absence of any allusion to any of the alleged terms of a significant agreement must carry with it the logical implication that there was no agreement.

30. Driven to meet that obvious problem, Glatt protested that the fact that NZ at once embarked on marketing the Trolex products is corroborative of such an agreement because, so it is advanced, it would have been senseless to do so without the necessary assurance and protection of exclusivity. In my view, such conduct does not diminish the contrary proposition. Moreover, this contention has to compete with a more obvious inference for primacy: Glatt was overly eager to impress Trolex with the prowess and reach of his sales team. He had sought out Trolex during 2007 with a view to expanding his own stable of sales offerings despite no history of prior contact whatsoever, a strong indication of NZ's needs to find fresh revenue streams, from which it is appropriate to infer a need by NZ for such revenue streams.

31. The contention that the contents of the emails of 7 December can be construed as supporting the conclusion of an agreement is unsound. The fingernail-clutch at Glatt's own mention in his email of an 'agreement to provide support' as corroboration of an

larger agreement is ripped from the ledge by the further remarks in the very same sentence, in which the said support is said to be for a 'confidence building/getting to know you exercise'. Such fuzzy- wuzzy statements are not the stuff of an agreement about exclusivity, a condition that is by no means determined by vague or 'in principle' assertions. Moreover, the reference by Glatt to the relationship 'growing' into a 'full scale situation' a plainly tentative entreaty, has the contention for a larger agreement having been sealed, plummeting down the cliff face.

32. A quote had been issued, ostensibly before the 4 December meeting, and was the matter, presumably, addressed in an email of Glatt on 29 October 2007. This became the subject matter of an email sent on 19 December by Peter Dawson to Glatt. It refers to his dissatisfaction with the content of a quote emanating from TSA. Peter Dawson makes two points of relevance to the present controversy. First, he says that Ken Dawson's instructions on what to quote "so that acceptable margins were obtained" had been ignored. Secondly, Peter Dawson says that NZ enquiries should be addressed directly to TUK whereupon "We will ensure that we allow for an adequate mark up for you'. Significantly, no mention is made of a 20% discount nor, indeed, of a fixed discount. Such remarks are inconsistent with the alleged agreement on price.

33. It was stoutly argued that a court should not be prissy when examining the content of the utterances of business people and unduly criticise them for the absence of clarity that might be expected from a lawyer. The caution mentioned by Harms JA in Namibian Minerals Corporation Ltd v Benguela Concessions Ltd 1997 (2) SA 548 (A) at 561G is invoked:

> "Businessmen are often content to conduct their affairs with only vague or incomplete agreements in hand. They then tend to rely on hope, good spirits, *bona fides* and commercial expediency to make such agreements work. But when

> they are at loggerheads, it appears to be futile to consider whether they would have been able to do so. Once a Court is called upon to determine whether an agreement is fatally vague or not, it must have regard to a number of factual and policy considerations. These include the parties' initial desire to have entered into a binding legal relationship; that many contracts (such as sale, lease or partnership) are governed by legally implied terms and do not require much by way of agreement to be binding (cf *Pezzutto v Dreyer and Others* 1992 (3) SA 379 (A); that many agreements contain tacit terms (such as those relating to reasonableness); that language is inherently flexible and should be approached sensibly and fairly; that contracts are not concluded on the supposition that there will be litigation; and that the Court should strive to uphold - and not destroy - bargains.

Furthermore, the endorsement and amplification of that approach in National Scrap Metal (Cape Town) (Pty) Ltd 2012 (5) SA 300 (SCA) esp [23] – [25] is urged upon us. There Leach JA held:

> "[23] Moreover, it is also necessary to guard against approaching a case such as the present on the assumption that businessmen will act in a businesslike manner or with meticulous concern for the keeping of accurate records. All too often they do not. As Harms JA has pointed out:
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> > 'Businessmen are often content to conduct their affairs with only vague or incomplete agreements in hand. They then tend to rely on hope, good spirits, *bona fides* and commercial expediency to make such agreements work.'
>
> This is all the more so in this case where there was not only a close symbiotic relationship between NSM and M&R, but where M&R also had representation on NSM's board and was therefore a party to its business plans and strategies. The closeness of the relationship between M&R on the one hand and NSM and Murec on the other may readily explain why the respective parties did not conduct their business relationships with greater formality. In particular it may well explain why agreement on a ten-year oral lease did not result in it immediately being reduced to writing. And in regard to this latter issue, it is significant, as Movsas pointed out, that it had taken years for the amending agreement to be reduced to writing despite consensus on its terms having been reached. Consequently, so he alleged, NSM's board had become accustomed to the slow processes that took place within M&R's organisation and that he therefore never entertained any doubts that M&R would honour the oral agreement. This is a telling comment, and in the light of the relationship between M&R and NSM and the previous delay that Movsas mentioned, his explanation cannot be regarded as being one which is so far-fetched or untenable that a court is justified in rejecting it merely on the papers.
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> [24] In addition, as is clear from what I have already said, the respondents' argument is based in various respects upon what was or was not said at a number of NSM board meetings, relying on the minutes kept of those meetings for that purpose. It is necessary to remember that minutes of board meetings do not purport to be a verbatim

record of what was said; rather they tend to be a fairly terse synopsis of what was discussed, highlighting what the compiler, usually the company secretary, considered to have been of importance. Merely because something is not specifically recorded in a minute does not necessarily mean that it was not mentioned, even in passing, and this should be borne in mind when considering what effect the minutes have upon the probabilities.

[25] In the light of these remarks, it is clear that undue weight should not be accorded to the fact that the oral agreement the appellants rely upon was not specifically recorded in the minutes of any NSM board meetings. As clearly mentioned, the minutes of 19 June 2008 record that, after a presentation had been made in regard to the installation of a Newell 300 HP heavy-duty shredder at an anticipated cost of approximately R45 million, the board 'agreed to go ahead with installation of this shredder on condition that a long term lease agreement be entered into with CISCO where the shredder is to be erected'. While it is so that Noonan, M&R's representative on NSM's board, did not attend that particular meeting, he must have received the minutes as he attended the following NSM board meeting on 5 August 2008 when the minutes of the meeting of 19 June 2008 were confirmed and the shredder issue was again discussed. By then, according to the appellants, the meeting at the airport at which they alleged Noonan had agreed to bind M&R to a lease for ten years, had already occurred. Such a lease would have fulfilled the condition stipulated at the 19 June 2008 meeting as being necessary for the board to persist with the purchase of a shredder. Significantly, it did so persist. The acquisition of a shredder was discussed again at the board meetings of 20 November 2008 and 5 March 2009, both of which Noonan attended. Neither the minutes of these nor any other board meeting mentions a failure to obtain the required commitment to a long-term lease as a potential stumbling block to NSM making the substantial capital investment required to purchase a shredder. It is hard to conceive that no one on the board ever thought about the issue, Noonan included. Movsas, however, stressed that, after the agreement on the oral lease was concluded, he informed the other non-M&R members of the board thereof and, if he did, this might well explain why the issue was never raised pertinently at subsequent board meetings. By the same token, Noonan's failure to raise the issue could also be explained by his knowledge of the lease. In these circumstances there really is nothing overtly sinister in the failure of the minutes to specifically record that oral agreement had been reached in regard to a long-term lease to accommodate the new shredder.

34. It is, however, not to be overlooked, that in each case, where such a caution is pertinent, the case must be assessed on its own facts. Doubtless, where business partners and other trading associates of long standing, who interact with a degree of informality, have formed friendships and have assumed understandings of one another, (such as in the **National Scrap Metals Case**) they might indeed exercise less care in expressing what are believed to be their common ideas and their expressions of their agreements may indeed

be vague or ambiguous and even abjectly slovenly. Where total strangers treat with one another (such as in the present case) that dynamic is less likely to occur. Necessarily, when delving into the pot of circumstances, what assumes true significance is not merely lack of precision, nor remarks merely consistent with the later alleged consensus, but expressions and conduct which are *inconsistent* with the consensus alleged to have been achieved.

35. Moreover, the persons whose actions are scrutinised must be assessed in proper context too. The business practises of the apocryphal Jules Street second hand car dealer and a stereotypical member of a leading stockbroker are not measured with the same stick. In this case, the evidence discloses that Glatt is an Engineer, an MBA graduate and a businessman of many years experience in Johannesburg. The manner in which he conducts business and the choice of expressing himself must be assessed accordingly. Moreover, Glatt exhibited important insights into the dynamics of a relationship in terms of which a local distributor sells the products of an overseas supplier who has a locally based outlet. The risk was real that the local distributor might invest time and money in developing a local market only to have the supplier then cut it out of the supply chain and deal directly with the end-users. The solution to that risk was of cardinal importance. Glatt was vocal about this issue from outset, and rightly so.

36. Self- evidently, the obvious solution was exclusivity in defined markets; ie a sole distributorship. Glatt claims he achieved this through an oral agreement on 4 December, notwithstanding no reference to such an agreement in the 7 December email.

37. It was argued that we should find the *naturalia* of the agreement were orally agreed and that they were so elementary that the parties, because of their common understanding, had

no need to express these terms in the subsequent correspondence. (See Kerr, The Principles of the Law of Contract, 6th ed, Butterworths at p338 -339 on the use of this term) In my view, it is unhelpful, and perhaps dangerous, to contemplate an agreement, such as the one here alleged, as being one which can be wrapped up by a consensus on the so-called *naturalia*. That nomenclature may be useful when dealing with generic transactions of ancient provenance, but there is nothing generic about the material terms necessary to tie two traders into an 'exclusivity relationship' which has not only one obvious and predicable set of rights and obligations, but is, rather, a formula to be especially invented to deal with a range of possible pragmatic outcomes which need to be thought of and accepted or rejected or compromised about. These circumstances mean that a quickie consensus is unlikely to occur about this sort of agreement. Indeed, this sort of agreement is *par excellence*, a type of agreement where the devil lies in the detail and to contend that it can meaningfully be concluded other than by addressing and spelling out unequivocally the exact details which, thereby, achieves the necessary consensus, is difficult to accept.

38. It was argued that, subject only to a refinement later achieved on a change in the discount rate from 20% to 40 % of published price, the whole agreement as alleged was concluded on 4 December. In my view such a conclusion is unsupported by the evidence. The references to the texts of the two emails of 7 December, cited above, are inconsistent with such an inference being reasonably drawn.

39. Moreover, given Glatt's legitimate anxiety about the issue of potential 'crossover' trading, it is difficult to reconcile that awareness with his alleged readiness to be bound by mere oral terms only, rather than secure the exact agreement, properly, in writing. Indeed, to the contrary, in my view, an examination of his conduct and communications reveals

that a proper written agreement is precisely what he did try, in vain, to achieve. It was conceded by Glatt that, in his efforts to record the terms of an agreement, when his last revision of a draft agreement (being the third version thereof) of 15 April was presented, there remained, on his own set of terms, details yet to be worked out on the limits of the markets. It was nevertheless argued that this was not a genuine problem because the peculiar circumstances of these two parties were such that there was no room for ambiguity about the zones of exclusivity and any lack of clarity was more apparent than real. This submission makes no allowance for the concomitant notion of a penalty commission becoming payable for trespass and ignores the putting up of the competing model contained in the second draft from TSA in which an introduction-commission-only model was posed. Moreover, the flaw in this proposition, advanced on behalf of NZ, is illustrated in respect of the Beatrix mine transaction debacle, where Glatt alleges TSA poached a NZ client; an issue which enjoys specific attention hereafter.

The Pre-9 April Meeting period

40. During this period there was one meeting and two drafts agreements were generated. In addition several quotes were issued by TSA to NZ.

41. Glatt, Maartens and Ken Dawson met at a Norwood restaurant on 22 January at a time when no transactions had yet occurred; the first business to bubble up after 4 December was a quote issued on 15 February.[1536] Maartens, in the main, testified about this meeting. He says that pricing was the major issue discussed, that a 40 % arrangement was struck and of Dawson's attitude he said 'I don't think he had a problem'. Curiously, Glatt did not even allude to this meeting in his evidence in chief. When asked about it in cross-

examination he recalled nothing of m[illegible]arded it as a social get together. He said he had no recall of the pricing being [illegible]ut did not dispute that it could have been addressed.

42. Ken Dawson agrees that the questio[illegible] was indeed addressed. Ken Dawson said that Trolex practice was 15% discou[illegible]n the mining sector. NZ operated, as he understood, mainly in the broader in[illegible]r where higher discounts were the norm. In the context of that broader experie[illegible]% wanted by NZ was mentioned. To Dawson, 40 % was never feasible be[illegible]mpossible to also accommodate a profit to Trolex. This evidence is consisten[illegible]rmonishment by John Pierce – Jones of Maartens on 21 July 2008 for quoting [illegible]to Pyradim on the Beatrix Mine deal instead of the usual 7.5% - 10 %. Ke[illegible]ft the meeting, still wanting a business plan from Glatt and other than a rudi[illegible]AT analysis about TSA, some months later, nothing in the form of strategic [illegible]nning was ever forthcoming.

43. About 2 February 2008, Glatt produc[illegible]reement.[1530] This draft, says Glatt, contained 'slight variations' to the al[illegible]ber agreement. Indeed, much detail not foreshadowed by the earlier account[illegible]ssions on 4 December made their appearance.

44. It contained provisions that state that[illegible]ints NZ 'as its exclusive distributor in certain specific geographic areas/appl[illegible]ustries..', and also grants 'exclusive distribution rights in other applicatio[illegible]n Africa..'. Moreover, an important innovation is that any direct sales by [illegible]Z customers would attract a *de facto* 36% commission to NZ. What these [illegible]plications are is not stated. (Maartens, interestingly, in evidence denies an [illegible] this 'indirect commission' was reached on 4 December)

45. Further, the draft contains provisions about a pricing structure to NZ in terms of which Trolex is to 'maintain an official price list' in which all quotes to NZ are to be at a 20% discount and a 'further 20 % discount'.

46. Ken Dawson says that when he saw this document he was 'stumped' as it did not reflect what was discussed in December 2007 or in January 2008 when he had met Glatt.

47. A response from Trolex came on 1 April 2008 [1548] in the form of a draft counter-proposal. The genesis of this document is itself the subject of debate. It emerged from TSA; Maartens says it carried the approval of TUK, but when certain provisions were debated he suggested that Hutton without his input might be responsible for the provisions. Hutton says that Maartens stood over her shoulder as she composed it after a discussion of Glatt's draft.

48. Hutton could not recollect if it had been sent to TUK. An email of 1 April confirms that she did send it. [1553] Further, the adverse ramifications to Trolex of the model NZ was asking for are mentioned by her in that email. It also says that the TSA staff want to discuss pricing with Green when he would be in Johannesburg the following week. Maartens was vague about whether any changes that were made after it was sent to TUK. Maartens was adamant he had no powers to contract himself.

49. The critical portions of the draft, dated 1 April 2008, read thus:

> Paragraph 3: " Trolex hereby appoints N&Z as its exclusive distributor, in certain specific areas (as introduced to Trolex by N&Z) Trolex and N&Z customers will be defined to by mutual agreement (as discussed in point 1.3 in the specific document,

annexure A to be updated if and when needed) Commission will only be paid when N&Z introduce [sic] a customer/mine to TSA." Annexure A was blank.

Paragraph 12(c): " Any direct sales by Trolex SA to N7Z customers (as defined by annexure A) will obligate Trolex to pay a commission of 20% of the OLP [official listed price] or as defined by the margin split on annexure C to N&Z."

50. These particular provisions, Hutton said in evidence, were inserted to protect Trolex. This awareness by her of Trolex's interests and the initiative taken to protect them was notable, and must be borne in mind when weighing her evidence at trial about what she then claimed to have been agreed between NZ and Trolex.

51. When Glatt saw the 1 April draft from Trolex he was agitated and says he voiced his resistance to its terms to Maartens. Glatt recognised that the 1 April draft contradicted the idea of exclusivity that he wanted. Plainly, an introduction commission was not what he wanted nor needed, nor a discount rate less than 40 %. Curiously, Maartens says he thought Glatt was 'happy with it', a certain improbability, not least of all because it was Glatt's unhappiness that prompted him to ask Maartens to set up a meeting with a TUK representative. Green, the financial director of TUK, who was visiting TSA on a routine trip to address Financial Year End matters, was asked, at the last minute, to meet Glatt.

52. The evidence tendered about these events amounted to a long commentary on the documents with little to add thereto. Glatt would have it that the various drafts, of which these were the first and second, evidence merely an 'evolution' of the relationship premised on an initial agreement sealed in December, rather than a course of negotiations.

53. The reader of the drafts cannot reasonably reach the conclusion that these drafts point to anything more than an exchange of positions in the course of negotiations. Neither draft suggests a prior agreement existed or that the documents are recordals thereof, still less refinements of a prior agreement. Important aspects, as alluded to above, critical to make commercial sense of the proposed agreement are consciously outstanding. More importantly, if the parties were, in April 2008, still fencing with one another about a 20% or a 36% rate of discount and moreover fencing with one another about whether a commission might be payable to NZ only if it introduced a customer to Trolex or payable on a blanket entitlement to a commission on the grounds of a trespass, the idea that the key elements of a sealed agreement could have been achieved on 4 December is brought into serious question.

54. Glatt conceded that a response from Trolex in the form of the 1 April draft was peculiar if an agreement already existed, on the terms he alleges, and he added that such conduct was, to him, 'unacceptable' However, he never communicated that view to Peter Dawson nor to Ken Dawson, with whom, he contends, an agreement in December had been reached.

The meeting of 9 April 2008

55. Glatt says that at this meeting, Green agreed to change material portions of the 1 April Trolex draft to accommodate Glatt's demands and that Glatt was tasked with producing a revision to be sent to TUK for signature. Glatt annotated the 1 April draft during the meeting. However, the annotations are themselves inconsequential and do not even serve as the rough text of any material deviations.

56. Glatt's evidence to substantiate these allegations was to flourish his reworked draft dated 15 April.[8]. The critical portions of the 15 April draft which differ from the 1April draft, provided:

56.1. That Trolex would retain exclusivity in its traditional markets to be defined in an annexure 'A1', (left blank); both Trolex and NZ would trade with customers listed in annexure 'A2' (left blank) provided that Trolex applied a price structure as agreed in the draft; and NZ enjoys exclusivity in all other areas in Southern Africa. (clause 3)

56.2. That Trolex would maintain an official price list to end-users which would allow NZ an effective 40 % discount, mentioned in an annexure (Clause 5), and if Trolex sold directly within this NZ exclusivity category of customers, Trolex would be liable to pay NZ a 40 % commission on selling price to end- user (Clause 8). (The reference in the previous draft that an introduction to the sales prospect would be the trigger for remuneration was, significantly, jettisoned)

57. Green says it was solely because he was fortuitously on the spot, he had been asked to check up on matters because of confusion among the TUK directors about what was really going on. Anterior to the confusion was a growing dissatisfaction with TSA management, in particular Maartens' alleged inadequacies in managing TSA.

58. Green says he was uninformed about developments between NZ and Trolex. Glatt, on this aspect offered no rebuttal other than to allude to Green being copied with emails. Green says that he did not go to the meeting briefed with details and had no intention of concluding any agreement. He relied on being informed about the *status quo* at the

meeting. He stated that he had, in any event, no authority to contract for Trolex and did not routinely engage in such matters as financial director. His mandate was to determine the *status quo* and report to the TUK board. There is no rebuttal of this evidence, and moreover, given the fact that Green had no prior involvement on any version, no reason to infer that it was improbable.

59. Green flatly denies anything was agreed. He confirms the 40 % rake off was discussed. Such a price structure was to him manifestly impossible to utilise and he said so. He denies there was a discussion about amending a price list. The nub was, so he says, the demand by Glatt for a 20% +20% structure which meant Trolex would have to put up its prices. That decision was not one he alone could make, regardless of his personal views. On that issue he envisaged a consultation at board level. He agrees that Glatt undertook to rework the 15 April draft and sent it to TUK, implicitly to facilitate that end. His next and only involvement was when he saw the 15 April draft from Glatt, some time later, [8] at TUK after his return home, whereupon he reported the events and his adverse views about the differences to the 1 April draft and the untenability of a 40 % discount to John Pierce-Jones.

60. Maartens and Hutton both endorse Glatt's assertion about the price change to 40 %, on 9 April and point to the amendment of the price list to show 40% of end user listed price. Hutton says this internal price list was not referred to TUK. The denial of knowledge of this step by Dawson and Green was unrebutted. The extent of NZ's case was to allege that the information was not concealed by the local staff, thus the directors had access to the data: a wholly unconvincing premise to contend for any actual knowledge on the part of the directors.

61. Accordingly, only the say-so of Glatt, as supported by Maartens and Hutton, exists to substantiate such an agreement on 9 April. In my view, the reasonable reader cannot, on the text of the documents find corroboration of that assertion. On the contrary, the exchange of drafts itself strongly points to the parties being engaged in an ongoing negotiation. Moreover, an examination of the three drafts shows no pattern of convergence towards consensus, rather the opposite is evident.

62. Notwithstanding all of these considerations, Glatt says that so firm was the agreement reached with Green on 9 April that the draft he prepared [8] was the *final text* and awaited only signatures. Despite that belief, he nonetheless sent the so- called 'final' draft *without his own signature*. The court *a quo* gave weight to this omission to immediately sign the amended draft that had been supposedly agreed to at the 9 April meeting and inferred that the omission pointed towards there being no agreement. This conclusion was challenged as a *non sequitur* on the footing that an agreement already existed; ie the 4 December agreement. However, it seems to me that the boot is on the other foot. If an agreement already existed, ie an oral agreement on 4 December, then at best, the parties were formally amending it *in writing* on 9 April: all the more reason to complete the paperwork there and there would be no need to refer it to the TUK directors for further scrutiny. In those circumstances, forwarding a signed version could have been consistent with the view that there was nothing left to discuss; an unsigned version suggests otherwise. To an observer, the 15 April draft is just that: another draft.

63. Moreover, no explanation is offered why Green would reverse the stance put up on behalf of Trolex in the 1 April draft. What could possibly have occurred to persuade Trolex to

double the discount rate and, especially given the vagueness of the market carve up, and forgo the prudence of the device of an introductory commission so that Trolex was pinned down to pay a penalty commission? The testimony reveals no substantive content to the necessary debate and capitulation inherent in the proposition advanced for the reversal What Glatt's evidence does allege, is that when Green had capitulated, he said to hide the 40 % in an annexure, a piece of cosmetic absurdity for a document that would in any event have been confidential to the two parties.

Post 9 April Meeting period

64. Green, upon his return to England, as alluded to earlier, when reading the 15 April draft realized at once it was at material variance from the document discussed and was unacceptable to Trolex. He went to John Pierce–Jones. No reply was given to Glatt, plainly a discourtesy that was unwarranted. Instead, Lee Pierce –Jones was dispatched to evaluate the South African operation.

65. In the meantime, when by 7 May 2008, nothing had matured about the 15 April draft, Glatt thereupon emailed that he wished to put the 'contract to bed'. He wrote to John Pierce Jones to say that the draft of 15 April was:

> '...in line with our agreement at our meeting at TSA, but if there were any discrepancies or issues we are keen to discuss and resolve'.

66. He got a reply from John Pierce –Jones, the same day. [1584] It stated that:

> 'we have read your draft of the contract dated 15 April 2008. Two or three of the points do cause Trolex some concern and are not acceptable. We have not come back to you on these points because the whole issue of our SA operation has come under review at board level. Without going into too much detail, we are not pursuing any

agency/distributor agreements with anyone until we have carried out an in depth analysis of our company's operations in SA. This could take 3-4 months up to June '08. Once the outcome and findings have been received and actions decided on, we will have a clearer picture of where Trolex is going in SA in the future. I understand that the only business has been a couple of chekers to date and nothing else is outstanding at the present time so there are no potential issues left to cause any immediate concern.'

67. This email was a classic polite brush-off. Glatt did not take the circumlocutory hint. Two days later, on 9 May, Glatt wrote back by email.[1584] The tone is supplicatory. He states:

'I can really appreciate that you are reviewing your situation, and that the uncertainty must be demotivating for all. Although I understand where you are coming from, we are now in a very difficult situation. One of our strengths is our dealer network where we have invested heavily in finding the right people and developing trust, relationships and business. *Based on our discussion with Ken*, we have introduced and promoted Trolex to our network. And while the order tally so far is small the prospects are excellent. In fact, I am impressed at how quickly we have been able to develop the situation to the extent that orders are now starting to flow.I have done all this on a *gentleman's oral agreement* with Ken. And I have every confidence that Trolex will make good on their word. But I do think it is important that we have some documentation on where we are. I am also concerned about your comments with respect to the draft contract and would value reviewing the points that concern you so that we can all understand where our comfort zones lie and where I may have incorrectly reflected our agreements.'

68. The next event of note, almost two months later, is Glatt's letter of 23 July 2008 [1613] in which he purports to sum up the history of the interaction. The material portions are thus:

'1. In October '07 Peter Dawson and I discussed the possibility of Trolex and N&Z working together in South Africa. Peter's proposal was that we should distribute to the industrial market and our response was that we should look at all markets that Trolex SA was not currently involved in. Our rational [sic] was that N&Z covers virtually the whole country through its offices in Johannesburg, Durban and Cape Town and its carefully constructed sub-distributor network.

2. A few months later Ken Dawson and Jacques Martens visited us and gave a presentation on Trolex products to our sales team. Ken, Jacques and I discussed the way forward as I was very apprehensive about working as a sub-distributor of a South African Company (Trolex SA) because of the conflicts that could arise. Ken made it clear that Trolex SA currently had their hands full with the coal mining industry and associated OEMs and N&Z could add value by distributing to the rest of the market. He also strongly motivated that Trolex was a highly ethical

company and seeks to work with and support their partners. *Based on these discussions I drafted a Distribution agreement* (A) which I sent to Trolex but *more importantly* we immediately started marketing Trolex products with enthusiasm.

.....

5. Distributorship Agreement

After much prompting, Trolex responded to my Agreement by way of an Agreement on Trolex letterheads, dated 2nd April 08 (B).

A few days later David Green was in South Africa and we met at Trolex SA with Jacques and Zia to finalize the Agreement. After in-depth discussions we all agreed and the changes to this Agreement were noted by me at the meeting. I subsequently produced Rev 1 of this Agreement, dated 15 April 08 (C). Trolex SA and N&Z have continued to work to this model. I know that David has said there are some errors – I am unaware of those except for a type on #5.2.

6. I have had two meetings with Lee which were unfortunately marked by disagreement with regard to (a) *the de-facto distributorship arrangement* and (b) our involvement in the methane drainage project. I presented to him the information above.'

(Emphasis supplied)

69. The next day Glatt submitted another letter headed: 'Re: Proposal Trolex appoints N&Z as their exclusive distributor in Southern Africa'. In it is a SWAT analysis about TSA and an offer to take over the TSA staff.

70. These letters solicited only an outwardly polite acknowledgement on 25 July from John Pierce-Jones which pointedly evaded being drawn into a discussion.

71. This sequence of events must be evaluated for relevance to the critical question: do the contents point towards an agreement as alleged? In my view, the answer must be no. From the welter of exchanges some stand out. First, Glatt's response on 9 May to the news that no agency agreement will be concluded was not to refute that statement as nonsense and to assert the terms of an existing binding agreement. The omission of such an assertion is remarkable, more especially because he articulates his grievance that NZ

has invested resources into the relationship. However, Glatt then described his predicament as the result of having "done all this on a gentleman's oral agreement with Ken". The ordinary meaning of that label is an agreement that is unenforceable and performance is forthcoming at the whim of the promissor, upon which he stakes his honour and no more. So much is evident from Glatt's further remark that he has confidence that Trolex will make good on their word. (See the remarks of Alkema J in **Siyepu & Others v Premier, Eastern Cape 2013 (2) SA 425 (ECB) at [22[- [23]** about a 'gentleman's agreement') Moreover, the overall tenor of Glatt's email of 9 May addresses the prospects of concluding an agreement not resuscitating a broken one.

72. In the letter of 22 July Glatt took up this theme again when he tries, as he says, to give a history. He refers to the 4 December meeting with Ken Dawson. He describes that interaction as 'discussions'. Even after all this time he still does not allege an agreement on 4 December. Importantly, what he does state is that:

> "*Based on these discussions* I drafted a distribution agreement (ie [1530] of 2 February 2008, almost 3 months later) which I sent to Trolex *but more importantly* we immediately started marketing Trolex products with enthusiasm."
> (Emphasis supplied).

73. These communications are not consistent with an agreement being reached in December 2007. Indeed, it pleads that NZ went out on a limb on the basis of expectations of an agreement being reached. Later in that letter, after traversing various dealings, Glatt, (in paragraphs 5 and 6 of the email as cited above), addresses the distributorship agreement. His articulated grievance is that the 'model' of the agreement he drafted is the basis on which business prospects have been pursued and he asserts that a '*de facto arrangement*' exists, and again, significantly, does not allege an agreement. It seems to me that these

expressions contradict the notion of an actual agreement. Indeed, what they convey is the disappointment of a businessman who has exposed himself on the basis of an expectation that is not being fulfilled and seeks to proclaim the value of the relationship to the other party, hoping to resuscitate prospects.

The 'dealings' between NZ and Trolex December 2007 – July 2008

74. Thus far, the examination of the evidence has addressed the communications that specifically bear on the articulation of terms of an agreement. What remains is a consideration of NZ's contentions that corroboration for an agreement can be found from these facts:

74.1. The amendment of the price list.

74.2. The several quotes given by TSA to NZ.

74.3. Two product training sessions on 4 December 2007 and 3 March 2008

The price list

75. It is undisputed that Hutton made the changes to a list generated after 9 April. There is no evidence of an actual amended price list before then, other than her say-so. In both instances she says she acted on Maartens' instruction. She also says she did so in discussion with Green on 9 April. The submission is that this is consistent with Trolex agreeing to a 40 % price. This is correct. However, the directors repudiate the price and brand it the work of maverick staff with no instructions to do so. Maartens and Hutton contradict that repudiation and while asserting no authority of their own to fix a price, rely on their say-so that Dawson and Green authorised the prices after agreeing them with

Glatt in those terms. Accordingly, whether the changes were authorised or not turns on credibility no less than the probabilities. The probabilities have already been addressed and in my view are against such a price having been agreed. The credibility aspect is addressed specifically elsewhere.

The quotes

76. The directors were ignorant of the quotes that carried a 20 % and later a 40 % discount. As early as 19 December, Peter Dawson expressed annoyance at a defiance of instructions about a quote and solicited NZ to direct inquiries to TUK. NZ did not do so but persisted in treating with TSA. As no orders were placed, save for items called 'chekers' the probabilities of their ignorance is established. Upon that factual finding there is no inconsistency between the directors' denial of an agreement and their conducing trade in accordance with the terms denied. Moreover, the ignorance of the discount rates that Maartens sought to apply is richly illustrated from the contents of an internal Trolex email on 21 July 2008 from John Pierce - Jones to Maartens about the Beatrix mine deal for a methane monitor.[1608] This deal is addressed more fully hereafter; for present purposes it is sufficient to note that Pierce – Jones says to Maartens he is:

> 'intrigued to see that you had included a 20% discount to your client. I presume this amount has been factored into the price, and if that is the case there is no problem. It is very unusual to give this level of discount on a large project. For future reference, it might help you to know that it is usually in the region of 7.5% - 10 % on a project t of this size. Obviously these things have to be negotiated and thus information is just a guide. The discount is not for the mine but for Pyradim, the company that will be assisting us in this project....'

77. An argument was advanced about Trolex being bound by the conduct of Maartens. That is incorrect. Maartens was at pains to make it plain that his actions were not in terms of

authority vested in him but entirely on instructions from the directors. The mere fact of dealings in the form of quotes, the disputed price aside, proves no more than Trolex and NZ wanted to do business together, and cannot establish the terms of the alleged contract. Moreover the email cited is strong corroboration of the directors' ignorance of the 20% rate no less than of the 40% rate being in actual use by TSA and of Dawson or Cream having agreed thereto.

The product training

78. The foot of training, first by Dawson on 4 December and later by Maartens on 5 March 2008, demonstrates, similarly to the point addressed above, a desire to do business and no more.

The controversial Beatrix Mine transaction

79. A sale by Trolex of goods to Beatrix mine is the foundation of the money claim and its genesis warrants specific attention.

80. What the evidence discloses is that Trolex via Pyradim tried to secure a sale to Beatrix Mine of a methane gas monitor. Pyradim was a sub-distributor for NZ too. A quote was given by TSA on 12 June 2008 to Pyradim. As alluded to earlier, a 20 % discount was included. Moreover, Maartens had taken the lead on this potential transaction. Maartens' conduct in this regard is inconsistent with what he later says was the agreement in place between NZ and Trolex about exclusivity. If an exclusivity agreement was in place, the

quote should have been to NZ and included a 40 % discount at that date. This conduct contradicts his evidence about the terms of the agreement.

81. The main events are echoed in various email communications. By 18 July, the potential deal was still hovering, and John Pierce - Jones directed that TUK take full charge, meaning, in affect, that Lee Pierce – Jones, who was in Johannesburg at the time, be hands on. Lee Pierce – Jones, also on 18 July, reported back to John Pierce –Jones that there were several problems. He reported that Martens had told him two stories about how the lead came about. Importantly, he alludes to Maartens asking Lee Pierce - Jones to appoint Pyradim as a distributor and was irate when this was refused, whereupon Lee Pierce – Jones relented and sanctioned an *ad hoc* appointment. An allusion was made to the possibility of re-routing the deal via NZ whereupon Pyradim could then wrestle with NZ about the commission. Three days later John Pierce - Jones wrote to Maartens to address several hiccups and made the remarks about the aberrant allowing of a 20 %, discount cited above.

82. The following day, 22 July, Lee Pierce – Jones reported to John Pierce – Jones on a meeting with Glatt. [1611] the email contains important statements bearing on what the parties' stance was about their relationship. It reads:

> " Hello all,
>
> Jacques and I had a meeting this morning with Rod Glatt from N&Z.
>
> Our position was:
>
> We would pay commission on any business relating to an Environmental Monitoring lead which he had brought to our attention via Pyradim (Pyradim being the sale agent in the mine area)
>
> The methane drainage lead came about when during a visit to the mine Jacques was referred to a senior engineer.

N&Z did not initiate this lead have not been involved with it at any stage and were not aware of it until Trolex informed them therefore they are not entitled to the commission.

The fact that N&Z introduced us to Pyradim in relation to the Environmental Monitoring lead does not entitle N&Z to commission on any other leads we might encounter in conjunction with Pyradim.

The distributorship agreement has not been ratified and is still under discussion.

N and Z did not know about the lead until we made him aware of it (during my last meeting with him)

His position was:

Dave Green and Ken Dawson made a distributorship agreement with him, therefore the document which recently sent to TUK applies in this case.

We became aware of the lead because of N&Z.

We went back and forth with this for a while – he being adamant that we have agreed a distributorship deal. Everything I had to state as a final position that we would honour payment of commission of Environmental Monitoring but would not pay commission on the methane drainage lead. He then accused me of being a double dealer at point I ended the meeting.

Pyradim have been brought up to date. He does not feel that are any potential problems that might arise with the order..." [1611]

83. The next day Glatt penned the letter cited above in paragraph 62, in which he alluded to the meetings with Lee- Pierce – Jones and the disagreement about the "de facto" distributorship arrangement'.

84. As it turned out, the Beatrix deal, in its then form, foundered and on 13 August 2008 John Pierce – Jones acknowledges Maartens' email that the Beatrix project had gone out to tender. A cryptic remark is made about an opportunity to re-pitch a quote to pragmatically resolve the bitterness over the deal from NZ and soothe tempers. Subsequently, Trolex secured the deal and in or about March 2009, the goods were supplied to Beatrix.

85. It is plain that neither Maartens nor Lee Pierce – Jones acted as if an agreement as alleged was in existence. The reference by Lee Pierce -Jones to an introduction commission being the only model for sharing in the spoils is notable, as was his tender to pay a commission on such other deals where there had been an introduction. The perception by Lee Pierce – Jones that no agreement existed was tied to the need for 'ratification', a he put it, a stance consistent with Trolex's position at trial. Glatt's reported utterances that NZ had a an agreement with Ken Dawson and Green is the first such assertion; which assertion must be read with the allusion by Glatt on 9 May to a 'gentleman's agreement' and on 23 July to 'de facto distributorship arrangement'.

86. In my view, this course of events does not corroborate an agreement as alleged. The contingent nature of the references to terms under discussion is manifest.

The credibility and reliability of the evidence of Maartens and of Hutton

87. The trial court was persuaded that the testimony of Maartens and Hutton was unreliable. In my view that finding was correct.

88. The directors alleged that Maartens acted recklessly and contradicted instructions given to him. Instances have been addressed already. Lee Pierce Jones was breathing down his neck and he resigned on 30 January 2009. When the litigation brewed, Maartens was approached to consult with the Trolex lawyers. He evaded this, and turned up as a NZ witness. It emerged that his departure was under a cloud. There were issues about money being owed for his cell phone. Also there were allegations about irregularities in

managing the provident fund contributions. It was wholly appropriate to construe his stance was hostile to Trolex and influenced by personal grievances.

89. However, the most important reasons for regarding his evidence with suspicion are that it seemed that he tried too hard to back up Glatt's version of an agreement and stumbled in his zeal. He too made a 'mistake' in attributing 40 % commission to the 4 December agreement. How could he do so, when he caused quotes to be issued at 20%? Then he claims that an agreement was reached on price at the January 2008 meeting in Norwood, when Glatt has no recollection of that happening and ignores that encounter entirely in his own evidence in chief. Is it conceivable that on so vital an issue Glatt could forget and Maartens remember? Then, on the actual exchanges between Glatt and Dawson and Green he offered no substance about the discussion. He emphasises the handshake on 4 December. About the 9 April price variation, he says Green seemed not to have a problem with 40%, a weak and evasive remark. He tries, disingenuously in my view, to distance himself from the composition of the 1April draft and suggest Hutton is the true author; she saying he read it over her shoulder. Moreover, he concedes a 40 % discount stripped Trolex bare of profit exposing the implausibility of that ever having been a seriously considered choice by Trolex. And lastly, he could not have dealt with Pyradim and Beatrix in the way he did if he believed there was a liability of a 40% commission to pay to NZ by so doing. Indeed, his conduct affords no corroboration of the 40% penalty commission.

90. The tangential argument about Maartens' authority to bind Trolex is a red herring. Maartens was at pains to disavow any authority to bind Trolex and NZ's case at no time avers that he represented Trolex in reaching an agreement.

91. Hutton's hostility to Trolex was even more transparent. She was, indeed legitimately, aggrieved by her sudden retrenchment. On her perspective it amounted to an unfair dismissal. This was an especially insulting blow because she had been implored by TSA to return to it after she had moved on only a year or so earlier. She was treated shabbily.

92. She stated bluntly she did not want to be on the side of Trolex and came to testify for NZ. She can contribute nothing about the 4 December agreement. She was present on 9 April and says the 40 % increase was approved. Yet, she too offers no substance to that having happened at the meeting and why the introduction commission formula might have been changed for exclusivity and a penalty commission yet she claims that immediately after the 9 April meeting, Green authorised the amendment to the price list, which Green denied flatly. She says also that Maartens instructed the 40 % rate be effected, but further, like Maartens, she acknowledged the absence of business sense for Trolex to agree to such a rate.

93. In my view neither of these witnesses was reliable.

Conclusion

94. In my view, the traverse of the facts of the engagement between Trolex and NZ do not, upon a holistic appreciation, in accordance with the authorities cited above, substantiate the contention that the alleged agreement was indeed reached on 4 December as to exclusivity, and a commission payable for trespass, and that later on 9 April the rate was varied to 40%.

The order

95. The appeal is dismissed with costs.

SUTHERLAND J

CARELSE J

I Agree.

RANCHOD J

I agree.

Hearing: 2 May 2013

Judgment delivered: 4 June 2013

For the Appellant:

Adv A Subel SC, with him AK Berlowitz,

Instructed by Shapiro–Aarons Inc

Ref: D Shapiro

For the Respondent:

Adv C Acker,

Instructed by

Pagel Schulenburg Inc

Ref: A Pagel