PARTIES:	ASTEC CORPORATION LIMITED T/A ASTEC PERFORMERS v ELMEC PTY LTD
TITLE OF COURT:	SUPREME COURT (NT)
JURISDICTION:	CIVIL JURISDICTION
FILE NOS:	No. 398 of 1986
DELIVERED:	Darwin 19 February 1992
HEARING DATES:	17, 18, 19 June 1991, 23, 24 and 25 October 1991
JUDGMENT OF:	Angel J

CATCHWORDS:

Contracts - Particular parties - Principal and agent - Whether intermediate party was agent to defendant or party in own right - "Sale or return agreement" - "Agency" - Agreement headed "Agency Agreement" not conclusive - Relationship actually one of distributorship

Weiner v Harris [1910] 1 KB 285; 290 applied.

Curtis v Perth and Fremantle Bottle Exchange Co Ltd (1914) 18 CLR 17; 25 applied.

Janesich v Attenborough & Son (1910) 102 LT 605; 607 applied.

International Harvester Co v Carrigan Hazeldene Pastoral Co (1958) 100 CLR 644; 652 applied.

REPRESENTATION:

Counsel:

Plaintiff:	P Gabrynowicz
Defendant:	P Smith

Solicitors:

Plaintiff:	P Maher Mildrens
Defendant:	M Carter Close & Carter

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No.398/1986

BETWEEN:

ASTEC CORPORATION LIMITED
T/A ASTEC TRANSFORMERS
Plaintiff

AND:

ELMEC PTY LTD
Defendant

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 19 February 1992)

The plaintiff, a New Zealand company, is in the business of manufacturing electrical transformers, or substations as they are sometimes known. The plaintiff was originally named Tolley Industries Ltd, and traded as Tolley Transformer Industries. On 8 November 1985, it changed its name to Astec Corporation Ltd and thereafter traded as Astec Transformers.

The defendant is an electrical contracting company incorporated in the Northern Territory. In 1983 an arrangement was made. The plaintiff, the defendant and

Power Enterprises Pty Ltd ("Power"), a company carrying on business in Darwin, were involved. The legal nature of the arrangement is in issue in these proceedings. The arrangement provided for the manufacture and supply of four electrical substations by the plaintiff. A later arrangement, struck in the same way, provided for the manufacture and supply of one further substation. In each instance the arrangement was that the equipment was to be manufactured by the plaintiff in New Zealand to the defendant's specifications. Power acted as an intermediary. The substations were to be shipped to the Northern Territory Electricity Commission's yard for testing. The ultimate destination for the substations was on the then Darwin Community College site at Casuarina. The substations were to be installed there by the defendant.

The plaintiff claims payment from the defendant for the substations which it manufactured and supplied. The defendant denies the claim and, inter alia, counterclaims for damages arising from alleged delayed delivery of the substations.

The plaintiff's statement of claim alleges that at all material times Power was the agent of the plaintiff. Originally the defendant admitted that "in or about August 1983 the defendant contracted with Tolley Industries Limited through an agent, namely, Power Enterprises Pty

Ltd". In the course of the trial the defendant sought and was granted leave to amend its defence so as to deny the allegation of agency. The plaintiff joined issue. No question of estoppel was raised in answer to the defendant's revised stand. A consequence of the defendant's amendment is that it is necessary to determine the nature of the arrangement between Power and the plaintiff and the defendant.

Three matters were canvassed before me. A "sale or return" arrangement between Power and the plaintiff was mentioned. The arrangement was, the plaintiff asserted, a simple case of agency, whereby Power was authorised to contract with the defendant on behalf of the plaintiff. The defendant said it was a distributorship arrangement, whereby the plaintiff sold the stations to Power, which in turn sold them to the defendant; Power, the defendant said, was a principal seller, not the plaintiff's agent.

The question turns, inter alia, on the true meaning of exhibit P31 - a letter which purports to be an "Agency Agreement", between the plaintiff and Power. I say 'purports' because as Cozens-Hardy MR said in Weiner v Harris (1910) 1 K.B. 285 at 290:

> "It is quite plain that by the mere use of a well known legal phrase you cannot constitute a transaction that which you attempt to describe by that phrase. ... You must look at the thing as a whole and see whether that is the real meaning and effect of it."

Parties cannot, in the words of Isaacs J in Curtis v Perth and Fremantle Bottle Exchange Co Ltd (1914) 18 C.L.R. 17 at 25, "by a mere consensual label alter the inherent character of the relations they have actually called into existence."

The fact that the parties themselves termed the agreement an "agency" is no more than a factor to be considered; the court will look to the substance of the agreement. It is desirable to set out in full the terms of the letter which constitutes the purported agency agreement.

"2 June 1982

Power Enterprises Ltd
PO Box 2156
Darwin N.T. 5790
AUSTRALIA

Attention: Mr J Price

Dear Sir

Agency Agreement Between Power Enterprises (PE) and Tolley Transformer Industries TTI) (A Division of Tolley Industries Limited)

Fields of Activity Represented

1. The following terms and conditions are applicable to Tolley Transformer Industries agency for the sales of supplies and services involving activities within the areas of the Australian states of Western Australia and Northern Territories.

2. Basis and Rates of Commission

Commissions due by TTI shall be included in the price for goods and services as quoted by TTI to Power Enterprises and shall be at the rate of 12½% of the total f.i.s. price to PE or PE;s final

customer as the case may be.

Commission rates are variable as required dependant on written agreement by both parties.

3. Payment of Commission

Commission (to be invoiced as Representation and Promotional fee) will be payable at the time of transmittal of payment in full to TTI.

(We suggest to minimise payment time of commission PE contra this commission against payment to TTI so that TTI receive full invoice value to PE less 12½%).

Notwithstanding the above mechanism PE are to invoice TTI for 12½% of f.i.s. value with the invoice descriped[sic] as 'Representional and Promotional Fee'

PE agree to ensure all steps are taken by them to expedite payment to TTI following delivery and in any case the period from Bill of Lading date to transmittal of full payment to TTI should not exceed 90 days.

4. Transformer Stocks

From time to time PE will indicate in writing to TTI a requirement for the manufacture and delivery of stock transformers to PE Darwin (Stock transformers meaning units placed on order by PE for which they have no definite end customer at the time of order placement) TTI agree to provide such units to a mutually agreeable level.

If stock transformers delivered by an agreed date remain unsold on delivery to PE, PE agree to pay TTI at rate of 1½% per month from vessel ETA Darwin in consideration of the finished goods value financed by TTI. In addition PE agree to provide suitable storage, to cover the costs of handling and insurance and to pay any remedial costs due to storage of stock transformers for extended periods.

5. Spot Sales

PE have the right to negotiate spot sales above basic agreed list price. In such cases 40% of the price margin above basic list price will be paid to TTI and 60% will be retained by PE.

6. Quotations

TTI will provide written quotations to PE together with all required supporting documentation when requested. PE will then submit these quotations under their name to their customer.

Basic List Prices will be provided to PE. Such prices will be subject to normal escalation clause to be provided to PE at time of submission of the B.L.P. schedule.

7. General

TTI undertake to provide all reasonable back up service to PE to enable a sound customer base to be established. This will take the form of timely sales and engineering support information, visits by appropriate TTI personnel when required and provision of accommodation etc when PE personnel visit TTI plants.

PE undertake to represent TTI in a thoroughly professional manner and to provide all possible service assistance in terms of correction of shipping damage and other problems which arise from time to time (Note all TTI products will be insured to PE's store under our S.B.I. Open Marine Insurance Policy)

8. Termination of Agreement

Either P.E. or TTI have the right to terminate this agreement. Three months notice in writing of intention to terminate must be given by either party.

PE will notify TTI immediately of any problems that arise and will assist in all possible ways in providing corrective action.

---------- -----[signature]---

For Power Enterprises For Tolley Transformer Industries"

The hallmark of a "sale or return" agreement was authoritatively stated by Hamilton J (as he then was) in Janesich v Attenborough & Son (1910) 102 L.T. 605 at 607,

where his Lordship said:

> "... it is of the essence of a contract of sale or return that the person intrusted with the article shall have the right for the stipulated period to keep the goods and either sell them or make up his mind to become the purchaser himself."

In the case of a true sale or return the intermediary receives the goods from the true owner and has an option of becoming the owner himself. This option can be exercised by buying the goods from the owner himself, selling the goods to someone else, or by retaining the goods for so long that it would be unreasonable for them to be returned; see generally Sales and Consumer Law in Australia and New Zealand, KCT Sutton, Law Book Company 1983 at 256. It is evident that the arrangement with respect to the substations in the present case was not a sale or return agreement for a number of reasons. The substations were manufactured by the plaintiff to the specifications and in accordance with plans of the defendant. There was a great deal of evidence at the trial regarding the difficulties associated with the transportation of the substations. Mr Langley, the sales manager of the plaintiff, gave evidence of the fragility of the substations. For the substations to be returned to the manufacturer in New Zealand would at best involve a sea journey of some three weeks; at worst it could exceed six or eight weeks; any other mode of transportation occasions a very high risk of substantial damage. These matters indicate the substations were never to be the subject of any agreement between the plaintiff and Power for sale or

return.

The word "agency" has a specific legal meaning. In the words of the High Court in International Harvester Co v Carrigan Hazeldene Pastoral Co (1958) 100 C.L.R. 644 at 652:

> "Agency is a word used in the law to connote an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties."

As the High Court emphasised, the term is commonly used in a wider and non-legal sense. The High Court averted to the difficulties caused by the frequent use of the word in its non-legal sense (at 652):

> "But in the business world its significance is by no means thus restricted ... But as Lord Herschell said in a much quoted observation 'No word is more commonly and constantly abused than the word "agent". A person may be spoken of as an "agent", and no doubt in the popular sense of the word may properly be said to be an "agent", although when it is attempted to suggest that he is an "agent" under such circumstances as create the legal obligations attaching to agency that use of the word is only misleading': Kennedy v De Trafford [1897] A.C. 180 at 188.
>
> No one supposes that the "distributing agent" or "exclusive agent" in a particular "territory" for a proprietary commodity or specific kind of article or machine is there to put a "consumer" into contractual relations with the manufacturer. In the case of any wide geographical distribution there is a general understanding of the practices of allotting territories, of zoning, of providing some regional superintendence of dealers or distributing "agents" as well as of the maintenance, and sometimes of the proper use, of the machine or article. None of this implies that the manufacturer or the head supplier contracts with the ultimate buyer or "consumer" as vendor."

Counsel referred me to Bowstead on Agency, 15th

Edition, 1985, Sweet and Maxwell, at 21, where the learned author states:

> "The distinction between agent and buyer for resale normally turns on whether the person concerned acts for himself to make such profit as he can, or is remunerated by pre-arranged commission. A supplier who himself fixes the resale price is likely to be a buyer for resale: but the fact that the resale price is fixed by the manufacturer does not necessarily make the supplier an agent, for resale prices are frequently fixed by manufacturers. Exceptionally a buyer for resale may also be paid commission, or an agent remunerated by being allowed to keep the excess over and above a stipulated price."

The essential question in this case is whether the relationship between the plaintiff and Power is to be characterised as agency or sale; the two relationships are mutually exclusive, see Bowstead, at 20.

Here, the majority of Power's correspondence to the defendant included an annotation at the bottom reading "agents, Tolley Transformer Industries"; however for the reasons I have already stated, this is only a factor to be taken into consideration. The agency agreement clause 3 makes it plain that remuneration of Power is to be a set percentage of the value of the goods, ie 12½%. The agreement describes this as a commission, but again this is only another factor to be considered. Clause 4, allows Power to negotiate spot sales at a price higher than that specified by the plaintiff. The profit from such spot sales is to be split 60:40 between the plaintiff and Power.

From clause 3 it would appear that the plaintiff was to

invoice Power for the full value of the station. Power were to then invoice the plaintiff for the payment of their commission of 12½% to be described as Representation and Promotional fee, although in reality the commission would be paid by Power retaining 12½% of the total cost of the substations, and transmitting the rest to the plaintiff. These arrangements are inconsistent with a direct sale from the plaintiff to the defendant.

Evidence was adduced that both Power and the plaintiff invoiced the defendant for the substations.

Exhibit P21 consists of two invoices from Power to Elmec dated 25 January 1985 totalling $90,500.00. Exhibit 23A contains an invoice dated 15 March 1984 from the plaintiff to the defendant for the first four stations and an invoice dated 29 August 1984 for the final station. A number of letters concerning the dispute between the plaintiff and the defendant are in evidence. The correspondence is between the plaintiff and the defendant as to the payment of the price for the goods and an allegation of liability for consequential damages. It appears that neither the plaintiff nor the defendant at that stage considered that Power was an appropriate party to be engaged in the dispute.

It is significant that order number 469 is an order for the substations from the defendant to Power and that the

test certificates for the substations issued by the plaintiff nominated Power in the space for "customer Name". These matters are indicative of a sale from the plaintiff to Power rather than from the plaintiff to the defendant.

Power was advised by the Northern Territory Department of Transport and Works of all the contractors tendering for the supply of electrical substations to the Darwin Community College. Power sent a telex to all the potential contractors (including the defendant) advising the price of four TTI transformers. When the defendant was successful in obtaining the head contract to supply and install the stations on site, it placed an order with Power, viz Order 469. Power so advised the plaintiff. The stations were manufactured and shipped to Darwin. In Darwin, modifications were required and Power arranged to have these completed. Power then invoiced the defendant on 25 January 1985. Earlier, on 15 March 1984 and in August 1984, the plaintiff and (inexplicably) Canzac Pty Ltd, a company sharing the same address as the plaintiff, invoiced the defendant.

The fact is that notwithstanding the use of the terms "agency" and "commission" in the "agency agreement", Power ordered goods from a manufacturer, the plaintiff, to sell to a purchaser, the defendant.

The evidence presents an arrangement which has some

features of a sale and some features of agency. Arrangements such as this are not uncommon. To establish that a legal agency exists, I must be satisfied that Power had or was held out by the plaintiff to the defendant to have the authority to create legal relations between Astec Corporation, the plaintiff, and Elmec Pty Ltd, the defendant. I am not satisfied that this is the case. Whilst in the agreement under consideration, the parties have used terms which could indicate an agency, as I have already stated, these terms are of themselves not decisive. In all the circumstances of this case, I am persuaded that the agreement between the plaintiff and Power was really one of distributorship and not an agreement for agency. The contract for supply was arranged when the Department of Transport and Works advised Power of a number of people who may be contracting for the Casuarina campus job. Power then contacted all of the potential subcontractors - including the defendant - with a price from the plaintiff. While Power described itself as an agent of the plaintiff, I am satisfied the term 'agent' was not being used in its legal sense, but rather in the general non-legal sense of a distributorship. It follows that the plaintiff must look to Power for the price of the substations and the defendant must look to Power for any damages arising from late delivery.

As a consequence of this conclusion, it is unnecessary to consider the other issues which were raised in the case.

The claim must be dismissed and the counterclaim also dismissed. I will hear counsel on the question of costs and any further orders.