CITATION:	*Hangan & Townsend v Copy time Pty Ltd and another Copykat Pty Ltd* [2003] NTMC 047
PARTIES:	PAUL HANGAN AND JOANNE TOWNSEND
	v
	COPYTIME PTY LTD AND ANOTHER COPYKAT COMPANY PTY LTD
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	Local Court
FILE NO(s):	20205830
DELIVERED ON:	22nd September 2003
DELIVERED AT:	Darwin
HEARING DATE(s):	15th September 2003
JUDGMENT OF:	Judicial Registrar

CATCHWORDS:

Assessment of Damages – contract – overpayments – Parole evidence rule – Damages for breach of contract

REPRESENTATION:

Counsel:

Plaintiff:	Mr Chin
1st Second Defendant:	Self
2nd Second Defendant:	Self

Solicitors:

Plaintiff:	Mr Chin
1st Second Defendant:	Self
2nd Second Defendant:	Self

Judgment category classification:	C
Judgment ID number:	[2003] NTMC 047
Number of paragraphs:	57

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20205830

[2003] NTMC 047

BETWEEN:

Paul Hangan and Joanne Townsend
Plaintiff

AND:

Copytime Pty Ltd
1st Second Defendant

Another CopyKat Company Pty Ltd
2nd Second Defendant

REASONS FOR JUDGMENT

(Delivered 22nd September 2003)

Judicial Registrar Fong Lim:

1. The Second Defendant agreed to purchase from the Plaintiffs a printing business the terms of that agreement are in dispute between the parties. The Plaintiffs sued the Defendants for monies outstanding on a stock take and the Second Defendant counter-sued for overpayments for stock and equipment and also for damages for the Plaintiffs' alleged breach of contract.

2. The Plaintiffs' action has been stayed for failure to provide security of costs as ordered by the court. The Second Defendant has been granted default judgement on its counter claim by the court and the matter is now before the court for an assessment of damages on the Second Defendant's Counterclaim.

3. The Second Defendant's counterclaim has two aspects

(a) monies owing to the Second Defendants for payments made to the Plaintiffs' which ought not to have been made;

(b) damages arising out of the failure of the Plaintiffs to " provide customer and sales activity database and general business records all incidentals, goodwill, consumables, promotional, and advertising materials, and stationery"(see paragraph 2(a)) of the Counterclaim.)

4. The Second Defendant relied on two affidavits of Mr Rohdes, a director of both Defendants, sworn the 16th April 2003 and the 21st August 2003 and two affidavits of Mr Chin sworn 21st of April and 27th July 2003.

5. In the affidavit of the 21st of August the claim for overpayments was neatly set out in table form with references to annexures supporting the claim.

6. Before proceeding to assess the damages owed I must point out that any judgement in favour of the First Defendant on the counterclaim has been irregularly entered and should be set aside. The First Defendant has no counterclaim only the Second Defendant.

7. **Overpayments**

In his affidavits Mr Rohde has set out a table of all the payments made between the parties and to and from third parties which he says netts a credit to the Second Defendant. Some of those payments are admitted by the Plaintiffs therefore I will only deal with those payments which have not been admitted.

8. Value of Stock

The Second Defendant places the value of the stock included in the sale at $16000.00 which they say was the amount agreed upon by the Plaintiffs. The Plaintiffs argue that there was never an agreement for $16000.00 for the stock and in fact the agreement was that the stock be valued at stock take.

9. Mr Rohde states that annexure B2, B5, B6, B9, B13 and J1 support his claim that it was agreed that the stock would be purchased at $16000.00. Annexures B2, B5, B6, B9, B13 purport to be contemporaneous notes of discussions had between the parties as to the sale of the business. If the notes do reflect the discussions they show there were certainly detailed discussions covering everything from the sale of stock and plant & equipment to the possibility of a job for Mr Hangan should he return to work. Those annexures are part of what seems to be Mr Rohdes record of his discussions with Mr Hangan.

10. It is clear that there was a proposal put to the Second Defendant by the Plaintiffs in the form of annexure A to Mr Rohdes affidavit. It is also clear that the proposal as put was not accepted and that there were further negotiations. If it is accepted that annexure B reflects the agreement between the parties as stated by Mr Rohde in his affidavit of the 16th April 2003 at paragraph 49 then it is important to look at the whole of the annexure to decipher the meaning of those notes.

11. Paragraph 12 of Mr Rohde's affidavit of the 21st of August makes it clear that the notes as shown in all the pages of annexure B were made at various meetings and discussions between the parties. It is not stated however I assume that the order of the pages in the annexure relates to the order in which those notes were taken. If that is the order in which they were taken it is clear that in Mr Rohde's mind the sum of $16000 was a figure he was placing on the stock.

12. It is interesting to note that on B11 there is a notation that "Stock on valuation to agree" this would seem to suggest that at the time of that notation the amount for the stock had not been agreed. Then on B13, a notation made on the back of an envelope, Mr Rohde again notes $16000 for Stock with the words "Deal" and a tick next to the word. In my view that suggests that Mr Rohde believed that an agreement had been reached.

However in B15 there is a notation, this time in Mr Hangan's handwriting, showing the words "+$25000 +Stock" this would indicate Mr Hangan had not placed a value on the stock at that stage.

13. The evidence of Mr Hangan in his affidavit is that there was a Heads of Agreement (annexure C to Rohdes' affidavit of the 16th of April) signed by both parties and that was the agreement which had eventually been reached between the parties. In Clause (c) of that agreement it was agreed that a stock take place on the first day of trading to work out a credit to the Plaintiff for the stock in hand. This agreement was dated the 31st of March 2001.Mr Rohde confirms that term of agreement and also the fact that a stock take took place on the 2nd to 4th April 2001 (see paragraph 46 &47 of his affidavit of the 16th April 2003). He accepts that the stock take came in at $29125.80 but says he disputed the basis for that valuation and later came to the agreement with Plaintiffs that he would pay $16000.00 for the stock.

14. The timing between the signing of the agreement, 31st of March 2001, and the date at which the stock take took place (2nd April – 4th April 2001) suggests that the parties had come to an agreement and the stock take was part performance of that agreement. The take over date for the business was the 1st of April 2001.

15. It is my view that the order of events were that the Plaintiffs sent a proposal to the Second Defendant for sale of their business, the Second Defendants considered that proposal and there were further negotiations (evidenced by annexure B) which culminated in the " Heads of Agreement" signed by both parties. The Second Defendants took over the business on the 1st of April as agreed and a stock take was done the next day. Clause (c) of that agreement dealt with the stock take however was not clear on the method of valuation. After the stock take there was a dispute about the method of valuation (at cost or otherwise). It is after that the relationship between the parties began to sour.

16. The Plaintiffs left Darwin for personal reasons before the matter was resolved. The issue of the stock was never resolved nor were several other issues subject of this litigation. It is my view that there was never an agreement valuing the stock at $16000.00. The Second Defendant confirms the stock take produced a value of $29125.80. The Second Defendant disputes the valuation but does not give an alternative calculation nor any evidence that he undertook his own stock take and came to a different figure.

17. The Second Defendant relied upon a letter he sent to the ANZ bank which expressed his belief that the stock would be "approximate value of $16000" (see annexure J) saying that was evidence that $16000 had been the agreed amount. My view is that all the way through the negotiations the Second Defendant had estimated the value of the stock at approximately $16000 and he placed that estimate in his letter to the bank to get finance. Mr Rohde was later surprised when the stock take gave a higher value.

18. In my view that the Heads of agreement is the agreement between the parties reduced to writing. There may have been some negotiation about the how the stock should be valued the terms show there was an agreement to do a stock take and a stock take was done. The Second Defendant cannot establish an different value of the stock and therefore I must accept the best evidence available to me and that is the stock take figure provided by the Plaintiffs of $29125.80.

19. **Amounts of $797.63 and $209.50**
The payment of the $797.63 is claimed by the Second Defendant to have been paid in error to the to the Plaintiff. The payment is evidenced in the records of the Second Defendant and the Plaintiff as wages. The Second Defendant claims that the payment was erroneously characterised as wages and therefore should be repaid. At paragraph 34 of Mr Rohde's affidavit of the 16th April 2003 he claims that the Plaintiff had been paid for the three

weeks which he worked for the Second Defendant after they took over the business and that he left that employment on the 15th of April.

20. The payment of the $797.63 was made on the 1st of May 2001. Neither party have provided me with evidence of the usual amount paid to Mr Hangan as wages prior to that. The Second Defendant must prove to me on the balance of probabilities that the payment was erroneous. I do not have enough evidence before me to convince me that the payment was made in error for all I know the payment could have been made for wages due to the Plaintiff because he had been previously underpaid. The documents support a payment of wages and there is no independent evidence to support Mr Rohde's claim that the payment was paid in error. It is my view that the payment of $797.63 was a payment of wages and should not be deducted from the Plaintiffs.

21. The evidence in relation to the $209.50 is even less convincing. In paragraph 33(b) Mr Rohde suggests that the amount was witheld as a "set off for cash and consideration taken by the Plaintiff". Mr Rohde does not establish what that cash and consideration was and how the agreement was reached. Mr Hangan disagrees with Mr Rohde but does not specifically address the issue of the "cash and consideration". Given the uncertainty of the evidence it is my view that the amount of $209.50 should not be deducted from the Plaintiff.

22. **Payments from creditors**

The next items in dispute are payments from creditors which the Second Defendants say were paid after 1st of April and were incorrectly paid to the Plaintiffs' bank account. It is important to note that the Plaintiffs have in fact admitted to some creditors mistakenly made payments into their accounts. However the Plaintiffs claim that the amounts claimed in paragraphs 38 & 39 of Mr Rohdes affidavit were either not received into their accounts or have been claimed twice.

23. The only amounts the Second Defendant can actually prove were paid were the two amounts received from the Darwin City Council totalling $455.00. There is no evidence that the invoices claimed had been paid at all. The Second Defendants could have obtained that evidence by way of letter from the creditors and annexed those letters to the affidavit. The Second Defendant did not even outline how they were made aware these payments were made to the Plaintiff.

24. The only evidence provided in relation to these amounts were the invoices regarding those accounts.

25. There was some consternation by the Second Defendant because the Plaintiff had produced a bank statement to an account they did not know existed and had not produced the bank statements for other accounts they did know existed. However in my view that of little relevance as it is for the Second Defendant to prove those amounts were in fact paid to the Plaintiff, not for the Plaintiff to disprove, and they have not done that. Accordingly I rule that those amounts contained in paragraphs 38 & 39 of Mr Rohdes affidavit should not be deducted from the Plaintiff except those amounts paid by the Darwin City Council.

26. **Payments made to stock creditors to be credited to Second Defendant** There were four payments claimed in this category and each of those are amounts are challenged by the Plaintiff.

27. The amount of $2683.00 claimed in relation to the creditor Colop is challenged on two bases. The amount itself should be $2638.00 not $2683.00 this is established by the Account Inquiry annexure F3 to Mr Rohde's affidavit. Further the Plaintiff claims that the only invoices outstanding to that creditor were invoices totalling $2637.40 which were credited the Second Defendant by the Second Defendant in its Accounts as "Adjustment Creditors PD N" for $2637.39. It could be co - incidental that these two amounts were only $0.61 apart and that the amount credited on the

30.4.2002 related to different creditors however it is my view on the balance of probabilities it was more likely to be a doubling up in the figures. I therefore disallow the amount of $2683.00 as claimed by the Second Defendant.

28. The amount of $150.00 paid to the Palmerston Business Association is claimed by the Second Defendant as a liability incurred before the 1st of April. However I accept the Plaintiff's claim that the amount was for a membership subscription and that Second Defendant was under no obligation to pay.

29. The amount of $289.08 Color Printers and CTM refrigeration for $211.53 were challenged on the basis that they were made some 8 months after the transfer of the business. Nevertheless in relation to the CTM payment it is clear from annexure H4 of Mr Rohde's affidavit of the 21st of August 2003 that was for a debt which was incurred on the 5th of October 2000. The Plaintiff has not established however that the amount paid to Colour Printers was in fact for an old invoice by either attaching that invoice or a statement from the creditor. Therefore I allow the amount of $211.53 to be credited to the Second Defendant and disallow the amount of $289.08.

30. Having dealt with all of the elements of the table relied upon by the Second Defendant my calculations for "overpayments" are as follows:

Item	Plaintiff	Second Defendant
Stock	$29125.80	
Payments admitted in para 6(a) of the Statement of Claim		4500.00
Payments admitted by Plaintiff deposited into bank account		$1763.00
Monies re hirer accounts	$4056.54	
Amounts admitted in para 7(b) of the Statement of Claim		$3049.76

Payments received from customers and admitted by the Plaintiffs		$3348.08
Payments received by the Plaintiff from Darwin City Council		$455.00
Payments for Stock delivered before 1st April 2001		$2937.40
Further payments received by the Plaintiff not admitted but proved		$211.53
	$33182.34	**$16246.77**
Balance to the Plaintiff	**$16935.57**	

31. Therefore the Second Defendant's claim for overpayments must fail in that I assess nothing is owed to the Second Defendant in relation to overpayments. I must make it clear to the Plaintiffs that this finding does not mean that I have found that the Second Defendant owes the Plaintiffs the $16935.57. The findings are only in relation to the Second Defendant's counterclaim not the Plaintiff's claim against the Second Defendants which of course has been stayed.

32. **Damages of $20091.10**

The basis for this claim is set out in paragraphs 16-27 of the Rohde's affidavit of the 16th of April 2003 and paragraphs 9-15 in the affidavit of the 21st of August 2003. Mr Rohde accepts that the price for the plant and equipment was $45091.10 "being part $40000 and $5910.00 for extraneous hire payments" (it is accepted that the second figure should read $5901.00).

33. While the Second Defendant accept that the Heads of agreement set out the agreed price for the purposes of establishing the damages to them they ask the Court to go behind the terms of the agreement to establish that the Plaintiffs have breached that agreement. They have asked the Court to look at the negotiations leading up to the agreement to understand how the figure of $45091.10 was arrived at by the parties.

34. I have already accepted that the Heads of Agreement reflect the terms of agreement between the parties. The question is whether I should go behind that agreement in assessing damage to the Second Defendant. In the interpretation of contracts the Parole Evidence rule is very clear. Where a formal document embodies the terms of a contract there is a presumption that the document expresses all the terms of the contract, with the effect that the court will look only to the document in determining what the contract really was an what it really meant (see Lord Blackburn in Ingliss v John Buttery & Co (1878) 3 App Cas 552)

35. Courts have been particularly careful about admitting evidence of prior negotiations especially where the document was specifically written to record that particular agreement, that is not just a pro forma where the blanks have been filled in. The reasoning behind that attitude is that such evidence is unhelpful because as the agreement has been reduced to writing the negotiations are irrelevant when interpreting the terms of the agreement.

36. The Second Defendant may argue that the agreement was written by a lay person and therefore should not be subject to such strict interpretation however that argument cannot hold there should be no distinction if an agreement is clear on its terms then the Court should not go behind those terms.

37. Clause (c) of the Heads of agreement reads:

> The Purchaser agrees to purchase all itemised and remaining plant and equipment for a consideration of $45091.10 being in part $40000 plus $5910.10 for extraneous hire payments. This portion of the agreement shall be subject to vendor finance paid monthly in arrears calculated with 10% compound component for any outstanding balance (ie not interest, but a premium for the plant in compensation for delayed payment)

38. It is clear from that agreement that $45091.10 was the price to be paid for the plant and equipment therefore I am not minded to go behind that agreement.

39. The amount of $45091.10 was paid to the Plaintiffs by the Second Defendant on the 10th of May 2001.

40. The Second Defendant now claims that the Plaintiffs breached the agreement by failing to provide the Second Defendant with " the customer and sales activity database and general business records, all incidentals goodwill, consumables , promotional and advertising materials and stationery and any such matter which may be discovered at a future date".

41. The Second Defendant has judgement on its counterclaim and therefore it is not for the Court to decide whether there has been a breach of the agreement but merely to assess the damages of that breach.

42. The Second Defendant has quantified those damages by going behind the terms of the agreement claiming the notes of the negotiations leading up to the agreement show that the sum of $20091.10 was the sum allowed for such items as set out in paragraph 38 above. I cannot accept that evidence because it is clear on the face of the agreement that the $45091.10 was in fact for plant and equipment of $40000.00 and extraneous hire payments of $5091.10.

43. In fact in trying to justify the sum claimed the Second Defendant has given evidence to contradict its claim. In paragraph 2 b. of its counterclaim the Second Defendant claims that the $45091.10 was made up of $25000 for plant & equipment and $20091.10 for the Plaintiffs to provide the customer and sales activity database and general business records. Yet in the heads of the a specific amount of $5091.10 was characterised as for "extraneous hire payments" therefore at most the Second Defendant's claim can only be for

$15000.00 if anything at all. This highlights the dangers of using notes of prior negotiations when there has been an agreement reduced to writing.

44. I am therefore faced with a dilemma. On the one hand I have found that Heads of Agreement reflect the agreement between the parties and in doing so I accept that there were no terms relating to the provision of customer and sales activity database and general business records. On the other hand the Second Defendant has judgement in its favour on its counterclaim including the claim for breach of contract for failure to provide those things. It is important to note at this point in time that the judgement obtained by the Second Defendant is not a judgement decided on the merits of the Second Defendant’s claim. The judgement was entered after an order of the court on the 10th March 2003 allowed the Defendants leave to proceed as if a Defence had not been filed for the Plaintiffs failure to appear at a pre hearing conference.

45. The Heads of Agreement is clear in its terms and if it were intended that the provision of customer and sales database were to be included in the agreement one would expect that to also be included in the written agreement. That expectation is firmer when the terms which are included seem to be well thought out and specific.

46. It is my view that in these circumstances I find that the basis of their claim for damages (the breach of contract) has no merit and that in turn affects the amount of damages granted. Here the Second Defendant is claiming damages calculated in reference to a non – existent term of the agreement and therefore cannot be granted any amount of damages at all on that basis.

47. Even if I found that the provision of the customer and sales database was part of the contract then the Defendant has not provided my with any evidence what damage has resulted from that failure. It is my view that I cannot go back to previous negotiations for reasons set out above. The Second Defendant should have provided me with evidence of how the

business suffered because it did not have the access to that database and then I could have assessed damages accordingly.

48. In conclusion even though the Second Defendant has judgement in its favour for damages to be assessed it has not provided me with evidence to satisfy me that its claim for $20091.10 is substantiated and therefore damages are assessed at zero.

49. **Costs -** the Second Defendant in its application for default judgement also applied for "Costs of its Defence and Counterclaim". The claim has been supported by the affidavits of Mr Chin as to the charges he has made of his client and the basis of those charges. Mr Chin claims that the terms of the judgement entered "Judgement in default of defence in favour of the Defendants against the plaintiffs Paul Hangan and Joanne Townsend", allows his client to claim all of its costs. Mr Chin claims that includes the costs of the Defence of the Plaintiffs' claim as well as the costs of the Second Defendant's counterclaim because that is what has been claimed in the application for default judgement.

50. Judgement granted in default can only be judgement for the remedies claimed in the party's pleadings. The judgement granted to the Defendants can only be granted in relation to the Counterclaim as the Plaintiffs' claim has been stayed. The judgement can only relate to remedies claimed in the pleadings relied upon by the party.

51. The Defendant's counterclaim claims

    (a) Damages in the sum of $23228.09…….. and

    (b) Costs

52. It is my view that the costs claimed in the counterclaim would certainly include the costs of the Defence to the Plaintiffs claim however the judgement obtained in default of Defence of the counterclaim can only relate to the costs of the counterclaim. It would be extremely unjust for the

Defendant to be granted its costs of defending an action which has been stayed on the Defendant's application for security for costs.

53. I therefore rule that the costs allowed by the judgement are the Defendant's cost of its counterclaim. Mr Chin's affidavits set out the costs he has charged his client which he claims his client should be entitled to. There has been no order making those costs assessable on an indemnity basis except for the order of the 11th of December relating to the Defendant's application for security for costs. Even the order of the 11th of December contemplates the costs being taxed in default of agreement albeit on an indemnity basis.

54. It is my view that to properly assess the amount of the Defendants' costs those costs should be taxed. The basis upon which the costs should be taxed is the standard basis unless otherwise orders (see order 63.28 of the Supreme court rules and 38.02 of the Local Court Rules).

55. Mr Chin, through his affidavits, is expecting the court to accept that all of the costs his has charged his client would be acceptable on taxation on a standard basis. For the court to accept that proposition would be careless.

56. **Conclusion –** The Defendants have not established on the balance of probabilities that it has suffered damage and therefore their damages are assessed at nil.

57. **Order –**

57.1 The judgement against the Plaintiffs in favour of the First Defendant is set aside & the judgment of the 26th February 2003 us varied to reflect judgement against the Plaintiffs for the Second Defendant in its counterclaim.

57.2 The Second Defendants costs in relation to the counterclaim are referred to taxation on a standard basis.

57.3 The Second Defendant to file and serve its Summons for taxation and Bill of costs within 28 days.

Dated this 22nd day of September 2003.

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Tanya Fong Lim
STIPENDIARY MAGISTRATE