IN THE DISTRICT COURT
AT NAPIER

CIV 2011-441-825

BETWEEN	FRESHMAX NZ LIMITED Applicant
AND	SANTA ROSA ORCHARDS LIMITED First Defendant
AND	OLIVER T RYAN Second Defendant

Counsel: M Keall for the Plaintiff
D Kerr for First and Second Defendants

Date of Decision: 9 November 2012

DECISION OF JUDGE B M MACKINTOSH

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[1] There are two applications before the Court. The defendants have applied for orders striking out the Plaintiff's claim and the defence on account of the plaintiff's breach of discovery orders. In turn the plaintiff has applied for orders varying the Court's discovery orders, requiring the defendants to further particularise aspects of the defence and counter-claim, and striking out parts of the defence and counter-claim.

[2] The essence of the claim is that the plaintiff, a large fruit exporter and also a provider of seasonal loan funding to fruit growers advanced moneys to the first defendant which were guaranteed by the second defendant. The plaintiff seeks repayment of what it says is the outstanding balance of seasonal funding advanced to the first defendant being $52,738.19. The defendants have filed set off and counter claims alleging that the plaintiff deducted commission from the sales of the proceeds of the first defendant in excess of the contractual rate and also deducted costs that it had not incurred.

[3] At the heart of these applications is a consent order for discovery which was made on the 9th of May 2012 by Judge Rea. It states:

> "The scope of the plaintiff's discovery will include all documentation regarding the plaintiff's sale of and the returns received for fruit grown by Santa Rosa Orchards Limited together with documentation substantiating all deductions made by the plaintiff from the sale of Santa Rosa Orchards Limited such as the deductions made for "quality compliance", "financing", "insurance", "internal logistics", and the like.

[4] The plaintiff to date has supplied some discovery but has not made full discovery in relation to paragraphs [17] to [26] and [54] and [55] of the Amended Statement of Defence and Counter-Claim maintaining that these allegations are vague and baseless and they require further particulars before they can do so. These particular paragraphs relate to the allegations that the plaintiff deducted commission from the sale proceeds of Santa Rosa's fruit in excess of the contractual rate and it made deductions of certain costs from proceeds of fruit before paying the net sum to Santa Rosa, but without having actually incurred those costs. As a result Santa Rosa was underpaid for its fruit.

The Issues for Determination

(i) Is the plaintiff bound by the discovery order made? Is the scope of the discovery order determined by orders and not the pleadings?

(ii) Is there sufficient particularity in respect of the allegations made in paragraphs [17] – [26] and [54] and [55] of the Amended Statement of Defence and Counter-Claim to enable discovery?

(iii) Should the defendants have to further particularise their claim without further discovery?

(i) Is the plaintiff bound by the discovery order made? Is the scope of the discovery order determined by orders and not the pleadings?

[5] The defendant submits that the order is final and that there is an obligation of the plaintiff to comply with the order as agreed in the consent memorandum and the

order must be adhered to. However it is submitted by the plaintiff that the discovery exercise is driven by the issues defined in the pleadings and not the other way round and I agree hence the long standing prohibition on fishing expeditions. A fishing expedition is defined as seeking to obtain information by discovery in order to find a course of action different to that pleaded or an order to find circumstances that might support an otherwise basis or speculative course of action. See *Australian Mutual Provident Society v Architectural Windows Limited*[1]. See also *Commerce Commission v Cathay Pacific Airways Limited*[2].

> "The starting point in such consideration of appropriate tailored discovery orders must be an analysis of the issues. Discovery categories will reflect the issues and will only be ordered for the discovery of documents that are relevant to those issues. Except in exceptional circumstances these issues will be discernible from a review of the pleadings. Discovery orders that are essentially of a "fishing" nature are not part of a tailored discovery. Orders will not be granted where the categories do not relate to a pleaded relevant issue but rather a non-pleaded issue which might be pleaded should discovery reveal documents that support such a pleadings.

[6] Just because an order is made does not mean that it may become redundant or need to be varied. It is quite clear that the Court has a number of mechanisms available to it to suspend or modify the terms of discovery directions including:

(a) DCR 1.18 (for extension of time)

(b) DCR 3502/HCR 7.10 (variation of directions at trial)

(c) 3.52.321 HCR 7.50 (variation of directions or order made in Chambers if a change of circumstances to affected party)."

DCR 3.58.17/HCR 8.17 (variation of discovery order McGechan at HR 8.17 summarises the position:

> "At any time a party may apply for an order varying the terms of discovery where attempt at compliance reveals the need for variation, or if a change of circumstances justify reconsideration of the order."

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1 *Australian Mutual Provident Society v Architectural Windows Limited* (1986) PRNZ 510 at 515
2 *Commerce Commission v Cathay Pacific Airways Limited* [2012] NZHC 726 at 13

[7] It is my view that the scope of discovery is determined by the issues in the pleadings and clearly there is power to review it if necessary. In this case the landscape has changed since the original order was made. The defendants subsequently extended the scope of their set off and counter-claim to include 2007 and 2008 seasons doubling the scale of literal compliance and have abandoned claims that the plaintiff failed to obtain the best possible price.

(ii) Is there sufficient particularity in respect of the allegations made in paragraphs [17] – [26] and [54] and [55] of the Amended Statement of Defence and Counter-Claim to enable discovery?

[8] The plaintiff maintains that the pleadings do not have sufficient particularly to enable it to comply with the discovery orders.

[9] The defendants maintain that the pleadings are sufficient that in terms of the House of Lords in *Farell v Secretary of State*[3] :

> "Define issues and inform the parties in advance of the case they have to meet".

[10] The relevant portion of the statement of defence and counter-claim are these:

> 17. Between 2007 and 2009 inclusive the Plaintiff was entitled to deduct commission as a set percentage of the Net FOB value of the First Defendant's fruit.
>
> 18. In addition to commission, the Plaintiff was entitled to deduct certain costs incurred by it, as set out at paragraph 6.2 above, before payment to the Defendant of the purchase price for its fruit.
>
> **19. The First and Second Defendants have asked the Plaintiff to substantiate the rates of commission it has deducted from the First Defendant's fruit.**
>
> 20. The Plaintiff has not provided the substantiation sought.
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> 21. **The Plaintiff has deducted commission from the price payable to the First defendant for its fruit in excess of the agreed rates of commission.**
>
> 22. The Plaintiff is liable to the First Defendant for all overcharged commission.

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[3] *Farell v Secretary of State* (1981) ALLER 166-172

> 23. The Plaintiff made numerous deductions from the purchase prices paid to the First Defendant for its fruit, for example for "documentation", "finance cost", "internal logistics", "quality control and preshipment" and "levies".
>
> 24. **The First and Second Defendants have asked the Plaintiff to substantiate the deductions made and the costs to which they relate.**
>
> 25. The Plaintiff has not provided the substantiation sought.
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> 26. **The Plaintiff is liable for the First Defendant for all deductions made from the purchase price paid to the First Defendant for its fruit, in respect of costs which the Plaintiff has not, in fact, incurred.**
>
> 54. The Plaintiff is indebted to the First defendant for all overcharged commission, in a sum yet to be quantified.
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> 55. The Plaintiff is indebted to the First defendant for all deductions made from the purchase price paid to the First Defendant for its fruit, in respect of costs which the Plaintiff has not, in fact, incurred. Such costs have yet to be quantified.

[11] It is relevant to note this is a statement of claim proceedings in accordance with Rules 2.7 and 2.8 of the District Court Rules. Rule 2.8 imports the High Court Rules. Rules 5.26(b) of the High Court Rules provides:

> "A statement of claim must give sufficient particulars of time, place, amounts, names of persons and nature and dates of instruments and other circumstances to inform the Court and the party or parties against whom release is sought of the plaintiff's cause of actions".

[12] Counterclaims are subject to the same requirements (Rule 5.5.4)

[13] Rule 5.48(5) provides a statement of defence (which includes a set off)"

> "The statement of defence must give particulars of time, place, amounts, names of persons, nature and dates of instruments, and other circumstances sufficient to inform the court, the plaintiff, and any other parties of the defendant's defence."

[14] The question is whether the particulars supplied by the defendants in paragraphs [19], [21], [24] and [26] are sufficient to inform the Court, the plaintiff and any other parties of the defendants' defence. The particulars sought are as follows:

> Paragraph 24 (Paragraph 19 of Amended Statement of Defence)

[6] Specify the particular commissions the plaintiff was asked to substantiate by reference to particular final invoices and the date or dates that each such request was made.

Paragraph 26 (Paragraph 21 of Amended Statement of Claim)

[7] In relation to each instance where the defendants say the plaintiff has deduced commission from the price payable to the first defendant for its fruit in excess of the agreed rats of commission specify:

(a) The particular deductions complained of by reference to specific deductions in particular final invoices, and

(b) The reasons why the defendants say each such deduction was in excess of the agreed rates of commission.

Paragraph 29 (Paragraph 24 of Amended Statement of Claim)

[8] Specify the particular deductions the plaintiff was asked to substantiate by reference to particular final invoices and the date or dates that each such request was made.

Paragraph 31 (Paragraph 26 of Amended Statement of Claim)

[9] In relation to each instance where the defendants say the plaintiff is liable to the first defendant for all deductions made from the purchase price paid to the first defendant for its fruit, in respect of costs which the plaintiff has not, in fact, incurred specify:

(a) The particular deduction complained of by reference to specific deductions in particular final invoices, and

(b) In relation to each such deductions specify the cost or costs the defendants say the plaintiff has not in fact incurred, and

(c) In relation to each specific sot the reasons why the defendant says the plaintiff has not in fact incurred that costs.

[15] These particulars are sufficient particulars of time, place, amounts, names of persons, nature and dates of instruments and other circumstances to inform the Court and the plaintiff of the defence and/or counterclaim pleaded at paragraph [17] to [26] and [54] and [55]. Mr Keall submits these particulars are simply the basics sought in terms of the Rules to fairly inform the plaintiff of the set off and counterclaim especially given the serious nature of the dishonesty allegations that are being made by the defendants. Without these basic particulars it is a mammoth task for the plaintiff to comply with the discovery order. This is also because the defendants have now widened the scope of their set off and counterclaim to include the years 2007 and 2008. The difficulty faced by the plaintiff is that total compliance with the

discovery directions would require it to waste enormous amounts of time and resources discovering vast numbers of irrelevant documents. At the time that the plaintiff agreed to the discovery directions, the statement of defence or counterclaim had not been filed or served. Therefore the Plaintiff was reasonably entitled to assume that the general allegations that the plaintiff had charged excessive commission and made unwarranted deductions would be properly particularised in accordance with the Rules when the defence and/or counterclaim is filed.

[16] It has been noted that "a party's pleading is not simply the minimum which the opposing needs so as to be able to plead" – see Brookers Civil Procedure District Courts and Tribunals HC 5.21.20.02.

> "In marginal cases, it is better to avoid generalities and rules of thumb and to return to principle. The pleader and the Court simply ask "in the circumstances of this claim, is that statement sufficiently detailed to state a clear issue and inform the opposite party of the case to be met?"

[17] This is not, under modern practice, simply some minimum which a defendant needs so as to be able to plead. It is intended to supply an outline of the case advanced, sufficient to enable a reasonable degree of pre-trialled briefing and preparation. Discovery and interlocutories are only an adjunct, not a substitute for pleadings – see *Price Waterhouse v Fortex Group Limited*[4]

[18] A temper to this general rule that a party's case should be sufficiently disclosed as to allow the preparation of a proper defence, it should also be noted that excessively detailed statements of claim are not necessary – the test is simply whether it is clear what is being alleged in order that a party may begin to construct a defence for themselves. This is noted in the decision of *BNZ Investments Limited v CIR* as follows:

> "The temptation to insist upon excessively refined pleadings is to be resisted as unnecessary and wasteful of costs and Court time. That is particularly so in complex cases where over pleading can obscure rather than clarify the issues. Case management should ensure that each side is fairly informed of the case that must be met. It can extend to requiring lead counsel to agree on list of issues. Evidence can be exchanged in good time before the trial."

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[4] *Price Waterhouse v Fortex Group Limited* CA179/98, 30 November 1998

[19] In this case the plaintiff submits that the contents of paragraphs [19], [21], [24] and [26] are speculative and vague and plainly do not give sufficient particulars to inform the Court and the plaintiff of the nature of the set off, defence and counterclaim pleaded. These paragraphs combined with the affidavit of Mr Ryan make far reaching and serious allegations of fraudulent conduct by the plaintiff. I note Mr Ryan says in paragraph [84] of his affidavit:

> "84. Through my contacts in the industry I am aware of a perception amongst growers that there is also another way in which Freshmax takes more "commission" than it is entitled to. It is my understanding that Freshmax has a practice of not declaring the sale price in cases where it has achieved an exceptionally high return. Instead, it declares a lower return, pays the lesser amount to the grower, and pockets the difference. Whilst this may sound like no more than rumour, it has been independently confirmed to me by a former Freshmax employee, and I raise it because it causes me considerable concern."

[20] Essentially this is an allegation of theft based on hearsay. Mr Kerr confirmed that the allegation was one of fraud although fraud is not specifically pleaded. It is a most serious allegation based on perception and rumour. I note that where fraud is imputed against any party the allegation must be stated with particularity - see Barker J in *Securitbank Limited v Rutherford (No.25)*[5]:

> "Another important principle is that where misconduct in imputed against any party, those allegations against him must be stated with especial particularity and care. This general statement applies to allegations of fraud, dishonesty, breach of trust, bad faith and the like ..."

[21] I agree that paragraph [19] and [21] do not inform the plaintiff of which commission deductions in the final invoice are challenged, nor which season, or how the defendant has calculated that those unidentified commissions are in excess of agreed rates of commission (that are themselves unspecified).

[22] Paragraph [24] and [26] do not inform the plaintiff which deductions were not incurred by the plaintiff or the relevant season or the basis on which the defendants made that assertion in relation to those unidentified deductions. In my view, these pleadings do lack sufficient particularity in their current form given the nature of the allegations being made.

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[5] *Securitbank Limited v Rutherford (No.25)* High Court Auckland A355/81 10 October 1983)

(iii) Should the defendants have to further particularise their claim without further discovery?

[23] Mr Kerr submits that only the plaintiff has possession of the documents needed to confirm whether or not the actual purchase price received by the plaintiff from overseas buyers for Santa Rosa's fruit was properly disclosed to Santa Rosa. As a grower Santa Rosa's only documents consist of buyer created tax invoices produced by the plaintiff which disclose a per unit return in New Zealand dollars. The plaintiff only will have possession of documents showing the foreign currency price it sold Santa Rosa's fruit for, the applicable exchange rate, and any deductions made before Santa Rosa was advised of and paid a return for its fruit. Therefore he submits that any requirement for the provision of particulars be delayed until after discovery and inspection. He submits that the defendants who are the counterclaim plaintiffs in this proceedings are in a comparable position to an intending plaintiff who cannot formulate a claim without reference to a document or class of documents and who may therefore apply under Rule 3.59 (HCR 8.20) for particular discovery before formulating its claim. In such a situation the intending plaintiff will have filed even no claim for a draft claim and the Court make orders for particular discovery without regard to the pleadings but on the basis that "the intending plaintiff is or may be entitled to claim in the Court for relief against another person (the intended defendant) but that it is impossible or impracticable for the intending plaintiff to formulate the intending plaintiff's claim without reference to one or more documents or a group of documents". However I agree with Mr Keall that in this case precommencement discovery is a red herring and that you cannot get an order based on wrong doing without substantiation.

[24] I take the view that given the serious nature of the allegations being made by the defendants that there must be some evidence (more than based on perception or rumour) before the plaintiff is put to the time and expense of complying with the discovery orders as they stand.

[25] Furthermore, there is evidence before the Court of the enormous scale and logistical difficulty of complying with the letter of the discovery directions – this is at paragraphs [16] – [22] of Ms Clubb's affidavit. Basically it indicates that for the

most part the plaintiff operates pooled account sales of fruit supplied by a small number of growers. In order to comply with the letter of discovery directions the plaintiff cannot avoid disclosing all sales and costs across each pool including the first defendant's fruit. There are no discreet sales or costs attributable to an individual grower. Total sales are divided by the number of units (cartons) in a pool and allocated to each grower at the same rate per unit. Similarly the total of each cost item applicable to a pool are totalled and allocated to each grower at the same unit rate. It has become increasingly apparent to the plaintiff that this in turn leads to intense logistical difficulties due to the need to protect sensitive information about its customers and other growers and the sheer number of documents involved. The plaintiff estimates that the 2009 season alone would involve thousands of documents. The plaintiff undertook a scoping exercise in relation to the 2010 season where the first defendant supplied small quantities of a single variety of fruit. This is instructive. That exercise took three people at least a week without even attempting to deal with the confidentiality issues.

[26] I accept that there would be a significant time and expense commitment required by the plaintiff to confirm with the discovery request as it stands, in the absence of further particulars. It seems to me that the plaintiff actually has been careful to provide discovery where it can in relation to issues between the parties that it can properly understand from the pleadings. I note that discovery provided in relation to non-payment allegations in paragraphs [27] to [31] and [40] to [44] of the amended statement of defence and counterclaim resulted in the defendant agreeing that that part ought to be struck out. As the payments were in fact made. I also note that the amended statement of defence and counterclaim does not contain allegations of the plaintiff failing to obtain the best possible price which was one of the original claims made by the defendant in the opposition to the summary judgment application in the High Court. I do not think this is a case where the plaintiff is being difficult. I think this is a case where the plaintiff has provided discovery in relation to all issues between the parties that are properly defined in the proceedings.

[27] In conclusion, the plaintiff's application for further particulars is granted. The defendants' application for orders striking out plaintiff's claim and defence on account of breach of discovery is declined.

Orders

(i) The defendants provide within 21 days the further particulars sought at paragraphs [6], [7]. [8] and [9] of the Notice Requiring Further Particulars of Set Off and Counter-Claim dated 16 July 2012 in relation to paragraphs [19], [21], [24] and 26 of the Amended Statement of Defence and Counter-Claim.

(ii) That time for compliance with the Discovery Direction issued by the Court on 9 May 2012 be extended until 30 working days after the further particulars are supplied in full.

(iii) At this stage I decline to make the "unless order" as sought by the plaintiff.

(iv) By consent paragraphs [27] – [31] and [40] – [44] of the Amended Statement of Defence and Counter-Claim are struck out.

(v) Costs on these applications will be reserved.

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B M Mackintosh
District Court Judge