IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CIV-2011-441-000827
[2012] NZHC 1560

BETWEEN	FRESHMAX NZ LIMITED Plaintiff
AND	OAK GLEN ORCHARDS LIMITED First Defendant
AND	FAMILY TRIO LIMITED Second Defendant
AND	MICHAEL JOHN ALCOCK Third Defendant
AND	DONALD BRUCE STEEDMAN Fourth Defendant

Hearing: 31 May 2012
(Heard at Napier)

Appearances: M Keall for Plaintiff
D Kerr for Defendants

Judgment: 4 July 2012

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
[on plaintiff's summary judgment application]

Introduction

[1] This case concerns the relationship between an apple marketer and an apple grower. Once bound by contract and financial arrangements to one another, their contractual relationship is gone. This dispute concerns a final wash-up as to who should pay what to whom.

[2] The case comes before the Court on the plaintiff's ("Freshmax") application for summary judgment for $96,556.93, together with interest, as the amounts allegedly owing on finance contracts.

[3] The calculation of the Freshmax claim is essentially not in dispute.

[4] The defendants say they have set-offs for generally unquantified sums. Their notice of opposition identified 17 specific grounds of opposition, three of which were conclusory.

[5] For the hearing, Mr Kerr focussed on six grounds and conclusions from those. Many of the original points of opposition were no longer advanced as grounds on their own but simply as background to the six grounds developed in argument.

The parties

[6] The key parties are as follows:

- "Freshmax" (Freshmax New Zealand Limited) (plaintiff) is a marketer and distributor of fresh produce and one of the largest fresh produce companies in New Zealand. It is a successor to ENZA in that Freshmax's current business originates in a management buy-out of ENZA subsidiaries, Freshmax and Frucor in the mid-1990's. It trades also under the name "Applemax" – I will refer to the entity simply as "Freshmax".

- "Oak Glen" (Oak Glen Orchards Limited) (first defendant) is an Onekawa (Napier) company which grows pipfruit on land bought by George Steedman in 1934 and subsequently expanded by him and his extended family.

- "Family Trio" (Family Trio Limited) (second defendant) is a related company, also involved as a pipfruit grower from Oak Glen's Onekawa base.

- Michael John Alcock (third defendant) is Donald Steedman's brother-in-law, also with interests in Oak Glen.

- Donald Steedman (fourth defendant) is a son of George Steedman, with interests in Oak Glen.

Principal debtor and guarantors

[7] Oak Glen is the principal debtor. The other three defendants are sued as guarantors.

The contractual arrangements

Introduction

[8] To read Freshmax's statement of claim, one might infer that Freshmax and the defendants had been contractually bound simply by loan contracts. Freshmax relies on two loan contracts, although it sues under one cause of action.

The 2009 loan contract

[9] Freshmax says it lent a total of $190,000 plus GST on the 2009 loan contract. It sues for $7,847.45 interest calculated to 5 December 2011 still owing on the 2009 loan contract. It says that by deed on 11 December 2009, $60,000 of the principal owing on the 2009 contract was rolled over into the 2010 loan contract. None of these figures (as financial calculations) are in dispute.

The 2010 loan contract

[10] Freshmax says that it lent $189,826.49 plus GST on the 2010 loan contract (including the $60,000 plus GST rolled over from the 2009 contract). It sues for $96,566.93 plus GST ($11,977.13) together with interest. None of these figures (as financial calculations) is in dispute.

The supply/loan interface

[11] Freshmax's evidence was given by Michaele Clubb, Freshmax's financial controller. She set out the background to the loan contracts in this way:

> **Typical Dealings with Suppliers of Fresh Produce**
>
> 13. Freshmax typically deals with fresh produce growers with a combination of seasonal supply agreements and seasonal funding agreements. Obligations incurred in one season are often rolled over and dealt with in the next season.
>
> 14. A seasonal funding agreement provides a grower with additional liquidity in the form of advances for the sole purpose of growing and harvesting the crop. In consideration of those advances the grower agrees to supply produce exclusively to Freshmax an agreed minimum quantity of fruit and in accordance with the terms and condition [5] of a supply agreement. Freshmax is authorised to deduct the advances from the final payments due to the grower under the supply agreement.
>
> 15. In consideration of the advance the grower grants a security interest over the crop securing the payment of the advances, interest payable on the advance and any further money advanced by Freshmax or any moneys owed to Freshmax by the grower and any interest payable thereon and the guarantor guarantees the payment of all those moneys to Freshmax.
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> 16. In addition to seasonal advances under a funding agreement Freshmax can also make advance payments to the grower under the usual supply agreement at the time the produce is delivered based on the indicative prices anticipated for the relevant export pool. These are commonly referred to as "bin advances".
>
> 17. Under the usual supply agreement Freshmax is not bound in any way by indicative prices and has a complete discretion to negotiate whatever price and terms and conditions of sale with any of its customers it thinks appropriate.
>
> 18. Under the usual supply agreement the final price payable to the grower for produce supplied is the amount received by Freshmax from the on sale of the relevant fruit to customers less:
>
> (a) Advances payments.
>
> (b) Freshmax's commission.
>
> (c) Costs incurred or charged by Freshmax including transportation, marketing, packing, insurance, advertising and quality/quarantine compliance costs. These costs are commonly referred to as "assignments".

(d) Any other deductions or costs payable by the grower under the supply agreement including price adjustment at the discretion of Freshmax for fruit considered by Freshmax to be of unacceptable quality.

19. If the aggregate of advance payments together with any costs incurred in relation to the fruit exceeds the amount received by the [sic] Freshmax in the on sale of the fruit then under the terms of the supply agreement the grower is immediately liable to Freshmax for the difference. This is commonly referred to as a "negative return".

The 2009 supply contract

[12] Freshmax and Oak Glen entered into a "2009 Pipfruit Export Supply Agreement" in November 2008 (at the same time as the 2009 loan contract).

The 2010 supply contract

[13] Freshmax and Oak Glen entered into a "2010 Pipfruit Export Supply Agreement" in December 2009 (at the same time as the 2010 loan contract).

Claims in opposition as set-offs

[14] Mr Kerr made submissions on six grounds of opposition. Each is put forward as constituting an arguable set-off.

[15] The benchmark test for equitable set-off was that set out by Somers J, delivering the judgment of the Court of Appeal in *Grant v NZMC Limited*[1] where his Honour said:

> The defendant may set-off a cross-claim which so affects the plaintiff's claim that it would be unjust to allow the plaintiff to have judgment without bringing the cross-claim to account. The link must be such that the two are in effect interdependent: judgment on one cannot fairly be given without regard to the other; the defendant's claim calls into question or impeaches the plaintiff's demand. It is neither necessary, nor decisive, that claim and cross-claim arise out of the same contract.

[16] The defendants' set-off claims in this case arise out of a bundle of contractual relationships defined by the two (November 2008) contracts entered into for the

[1] *Grant v NZMC Limited* [1989] 1 NZLR 8 at 12-13.

2009 year and from the two (December 2009) contracts entered into for the 2010 year. The defendants assert a lack of proper performance by Freshmax in the bundled contracts of each year. It is clearly arguable that their claims are in the nature of set-off rather than counterclaim. Mr Keall did not submit to the contrary.

Opposition grounds

[17] The defendants' six specific grounds of opposition were –

(a) Freshmax failed to pay Oak Glen for all fruit;

(b) Freshmax breached a fixed price agreement for Braeburn apples;

(c) Freshmax breached its obligation to endeavour to obtain the best possible price;

(d) Freshmax's price indications were misleading and deceptive;

(e) Freshmax debited Oak Glen's loan account when paying advances;

(f) Freshmax's poor documentation caused Oak Glen increased costs and tax liabilities.

Summary judgment – the principles

[18] The starting point for a plaintiff's summary judgment application is r 12.2(1) High Court Rules, which requires that the plaintiff satisfy the Court that the defendant has no defence to any cause of action in the statement of claim or to a particular cause of action.

[19] I summarise the general principles which I adopt in relation to this application:

(a) Commonsense, flexibility and a sense of justice are required.[2]

(b) The onus is on the plaintiff seeking summary judgment to show that there is no arguable defence. The Court must be left without any real doubt or uncertainty on the matter.

(c) The Court will not hesitate to decide questions of law where appropriate.

(d) The Court will not attempt to resolve genuine conflicts of evidence or to assess the credibility of statements and affidavits.

(e) In determining whether there is a genuine and relevant conflict of facts, the Court is entitled to examine and reject spurious defences or plainly contrived factual conflicts. It is not required to accept uncritically every statement put before it, however equivocal, imprecise, inconsistent with undisputed contemporary documents or other statements, or inherently improbable.

(f) In assessing a defence the Court will look for appropriate particulars and a reasonable level of detailed substantiation.

(g) The Court will take a robust approach and enter judgment even where there may be differences on certain factual matters if the lack of a tenable defence is plain on the material before the Court.

(h) Where a last-minute, unsubstantiated defence is raised and an adjournment would be required, a robust approach may be required for the protection of the integrity of the summary judgment process,

(i) Once the Court is satisfied that there is no defence, the Court retains a discretion to refuse summary judgment but does so in the context of

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2 *Haines v Carter* [2001] 2 NZLR 167, 187.

> the general purpose of the High Court Rules which provide for the just, speedy and inexpensive determination of proceedings.

[20] Mr Keall referred to additional case law which reinforces the requirement I have summarised at sub-paragraph (f), requiring a defendant to establish a proper evidential foundation for an alleged set-off or counterclaim. The correct approach requires that a Court, while being wary of shutting out defences which cannot be proved without resort to discovery, is not entitled to speculate on defences. As was said by the Court of Appeal in *Middleditch v New Zealand Hotel Investments Ltd:*[3]

> The Courts must of course be alert to the possibility of injustice in cases in which some material facts to establish a defence are not capable of proof without interlocutory procedures such as discovery and interrogatories. That does not mean that defendants are to be allowed to speculate on possible defences which might emerge but for which no realistic evidential basis is put forward.

[21] Mr Keall referred also to the related requirement upon a defendant, when providing an evidential basis for its cross-claim, to provide an evidential basis for its calculation of quantum. In particular, Mr Keall made this submission:

> It is also submitted that a defendant who wishes to raise the possibility of a counterclaim or set off as the basis of a dispute must quantify that loss and point to an evidential foundation for that loss. It is not enough to suggest a breach of contract may have occurred as not every breach of contract results in a loss. Unless the defendant can also point to a real basis for the [sic] alleging a significant loss there is no basis for advancing a set off defence of counterclaim.

[22] Mr Keall referred to the judgment of Ronald Young J in *Gray v Stevenson*.[4] In that case (involving the construction and sale of a house and intra-family loans) the District Court had refused summary judgment in relation to the balance of loans. One of the successful grounds of appeal related to a claim of set-off or counterclaim flowing from an alleged failure by the appellant to provide a Code Compliance Certificate. On appeal, Ronald Young J recognised that additional compliance costs could fall on the appellant's shoulders as a result of such a failure but then observed in relation to quantum:

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3 *Middleditch v New Zealand Hotel Investments Ltd* (1992) 5 PRNZ 392 at 395 per Gault J.

4 *Gray v Stevenson* HC Wellington CIV-2008-485-001935, 15 October 2008.

> [24] The difficulty for the respondent is that there is simply no evidence of the quantum of any claim at all, nor any evidence that in fact he has currently suffered any loss. The potential damages could be very modest or they could be quite large. The respondent, therefore, has not yet established that he has a credible counterclaim. It may be that the appellant has breached the terms of the contract given the house was sold without a Code Compliance Certificate. However there is currently no evidence at all that the appellant has or will suffer any loss.

and his Honour concluded:[5]

> [30] If ... as seems unlikely but possible, the Code Compliance Certificate was to be formally applied for by Mrs Gray, then Mr Stevenson may have a right of action against Mrs Gray arising from a breach of the warranty in the Agreement for Sale and Purchase. However, for reasons I have given, there is currently no clear loss arising from any such possible claim, so that could not, and should not, have been taken into account in assessing whether the appellant should have summary judgment. This proposed counterclaim was not, therefore, a basis to refuse summary judgment.

[23] *Gray v Stevenson* exemplifies the application of settled principles in this area. Arguable breach (supported by evidence) is insufficient unless accompanied by arguable damage or loss (supported by evidence).

[24] I start with this quantum aspect of the case. There are two claims of the defendants which I will determine constitute arguable set-offs, namely the allegation that Freshmax breached a fixed price agreement for Braeburn and the allegation that Freshmax's poor documentation caused the defendants to incur unnecessary accountancy fees. Apart from on those two claims, the defendants' grounds of opposition must fail. The defendants have not provided a sufficient evidential foundation for a loss flowing from other heads of conduct alleged against Freshmax.

Opposition ground 1 – Freshmax failed to pay Oak Glen for all fruit

The defendants' argument

[25] The defendants' express ground of opposition reads that:

> In breach of contract the plaintiff failed to pay Oak Glen Orchards Limited for all fruit it purchased from Oak Glen.

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5 At [30].

[26] At the hearing, in the way Mr Kerr developed his submissions for the defendants, this ground of opposition focussed on one invoice ("AX1005" dated 20 March 2009) from Freshmax to Oak Glen. The invoice records a sum of $14,927.57 as being the net return for two varieties of pear (Packham's Triumph and Williams bon Chretien). The direct credit notification which Freshmax sent to Oak Glen on the same date indicates that Freshmax deducted $11,137.50 from that sum before the balance payment was made and credited to Oak Glen.

[27] From this single invoice the evidence of Mr Alcock and the submissions of Mr Kerr for the defendants developed a proposition that Oak Glen had arguably been paid for neither the full value of this invoice nor its fruit from the 2009 and 2010 seasons more generally. I deal with the various propositions put forward for the defendants:

(a) Freshmax may not have advanced the $11,137.50. Freshmax's case is that it deducted the $11,137.50 on account of an advance payment earlier made. The form of invoice used for invoice AX1005 is a standard form which has various columns dealing with the gross and net return to the orchard and also makes provision for the recording of any advance earlier made. The AX1005 invoice did not have any recorded advance despite the fact that Freshmax did deduct the $11,137.50 upon the basis there had been a previous advance. Upon that basis, in his evidence, Mr Alcock deposed that there was an inconsistency in that the invoice recorded there being no advance payment. He at the same time recognised that his (other) records did indicate that Oak Glen had received advance payments of $11,137.50 in February 2009. He surmised that that may have been in respect of other pears sold to Freshmax.

(b) In response to these propositions raised by Mr Alcock in his evidence, Ms Clubb in reply exhibited a further copy of the invoice AX1005 from Freshmax's records. The further copy of the invoice had a handwritten record on the second page of the invoice recording advances on 27 February 2009 and 13 March 2009 for the total of

$11,137.50. She also produced other tax invoice records corroborating the making of the advances.

(c) When all these records are considered, it is clear that $11,137.50 was advanced in relation to these particular pears and was lawfully deducted as against invoice AX1005.

The paucity of pear sales

[28] In advancing a proposition that Oak Glen may not have been paid for all fruit purchased by Freshmax, Mr Alcock referred to the total volume of Packham's Triumph and Williams bon Chretien pears covered by invoice AX1005 (402 cartons and 220 cartons respectively).

[29] In relation to the Williams bon Chretien pears (recorded by Freshmax as having been purchased in the 2009 season), Mr Kerr accepted that the Williams bon Chretien pears were fully covered by AX1005.

[30] While AX1005 covers 402 cartons of Packham's Triumph, Mr Kerr noted that the records indicate that 542 cartons of pears had been purchased, indicating that 140 cartons remained unaccounted for. I note that this issue was specifically raised through submissions rather than through Mr Alcock's evidence. The issue was entirely answered in Mr Keall's submissions:

> a previous invoice (AX1013) covers that 140 cartons.

[31] Mr Kerr developed a second submission in relation to total volumes. Mr Alcock had given evidence that the totals for Packham's Triumph and Williams bon Chretien in the 2009 year (542 and 220 cartons respectively) were well short of the amount Oak Glen typically produced being (700 and 1800 respectively).

[32] Mr Keall submitted, correctly, that the vague evidence of Mr Alcock cannot give rise to an arguable defence. The reference to "typically produced" is not any evidence of what was produced in 2009. Freshmax is also entitled to point to the lack of any contemporary challenge to the various records which it produced

following delivery and payment, including the Season Payment Analysis for each year and the Average Return by Variety for each year. The lack of dispute or challenge to any of those figures at the time counts strongly against the defendants. The Court is left with no basis upon which to conclude that it is arguable that further quantities of the relevant pear varieties were supplied by Oak Glen and not paid for by Freshmax in the 2009 and 2010 seasons.

Opposition ground 2 – Freshmax failed to endeavour to obtain best price

The defendants' argument

[33] By the 2009 and 2010 supply contracts it was provided:

> Applemax will at all times endeavour to obtain the best possible price for fruit allocated to an Export Pool but shall have complete discretion to allocate fruit to an Export Pool and negotiate whatever price and terms and conditions of sale with any of its customers it thinks appropriate.

[34] Mr Alcock leads into this ground of opposition by saying this:

> Our review of all the information supplied showed that Freshmax had achieved appalling sale prices for Oak Glen's fruit. That is one of the defendants' principal concerns, and provides the basis for a counterclaim and set-off against Freshmax's claim that we still owe it money on our loan account.

The scope of Freshmax's discretion

[35] Given the reference to "complete discretion" within this provision, there was a predictable difference in the submissions of counsel. Mr Keall adopted "complete discretion" as the defining description of Applemax's rights in relation to price. Mr Kerr submitted, with particular reference to the contra proferentem rule, that once Applemax accepted an obligation to at all times "endeavour" to obtain the best possible price, the discretion was not unfettered. Mr Kerr submitted that a demonstrated failure by Freshmax to endeavour to obtain the best possible price could lead to a finding of breach of contract and assessment of damages. I am inclined to accept Mr Kerr's submission in this regard but I refrain from determining the point as this ground of opposition must fall away for other reasons.

[36] Mr Alcock's evidence involves an overlap between contentions that Freshmax failed to achieve agreed set prices and that Freshmax achieved extremely low returns. The two are of course different concepts.

The defendants' examples

[37] I focus on Mr Alcock's examples of what he refers to in the category of extremely low return. I will return to the allegation of a set price for the size 135 Braeburns and smaller ("smaller Braeburns"). Mr Alcock refers to $4.29 per carton achieved for the smaller Braeburns as against a $20 set price agreed.

[38] As an example of extremely low return, Mr Alcock refers to the price paid by Freshmax for New Zealand Beauty apples of russet grade in the 2010 season. Mr Alcock says that he had a discussion with Ian Chapman of Freshmax, pursuant to which Mr Chapman provided indications of likely returns on the russet grade. Oak Glen proceeded to incur the costs of picking, packing and processing. The price achieved per carton – $3.77 – is described by Mr Alcock as "suspiciously and disturbingly low".

[39] A further example given by Mr Alcock is of 357 cartons of Royal Gala apples for which prices (for different sizes) of $15.67, $14.61 and $10.05 per carton were obtained. Mr Alcock describes this return as:

> so low that... after deduction of the advance we had received for the fruit and the costs of packing it, we ended up not being paid at all, but rather owing Freshmax more money on our loan account.

Mr Alcock goes on to say that, from his knowledge of the market and discussions with a significant number of other growers, the return for the Royal Gala was extremely poor by comparison with returns achieved by other fruit sellers. He exhibits the returns achieved by another orchard for Royal Gala in the same season. Whereas Oak Glen had received a range of $10.05 to $15.67 the other orchard for the same sizes had received a range of $18.17 to $33.26.

[40] In addressing this evidence, Mr Kerr noted that the defendants are not privy to exactly why low prices were achieved for Oak Glen fruit, but the low prices

obtained are evidence that Freshmax breached its obligation to endeavour to obtain the best possible price. He submitted that a credible evidentiary basis is provided by the defendants as to breach which would inevitably cause Oak Glen loss through reduced returns for its fruit.

[41] Mr Keall submitted that what the defendants have done is to provide ad hoc examples with no attempt to systematically address all returns achieved or to provide objectively admissible evidence concerning achievable prices. He submits that Freshmax's "indicative returns" are by the contracts agreed to be indicative only, the relevant provision of the contracts providing:

> Any realisation advised under this clause is indicative only and Applemax shall not be liable for any loss suffered by the Supplier if the indicative realisation is not achieved.

[42] Mr Keall referred to the reply evidence filed by Mr Chapman on behalf of Freshmax with regard to the need for the Court to consider, as well as returns on individual consignments, returns on the full season. By reference to a table showing Oak Glen's average returns by variety for the 2010 season, Oak Glen's total Royal Gala production averaged $21.19 per carton. This emphasises the need for a proper analysis to be undertaken and provided in evidence before a conclusion can be reached on this point.

[43] I accept the thrust of Mr Keall's submissions. Mr Alcock's evidence is so lacking in systematic analysis (such as by focusing on single consignments rather than the whole year's outcome) that, if necessary, I incline to the view that the defendants have not under this head established an arguable breach. I leave that to one side. What is fatal in any event to the defendants' suggestion of an arguable ground of set off under this head is the absence of any proper analysis of quantum. The defendants' case under this head invites speculation.

Opposition ground 3 – Freshmax's price indications were misleading and deceptive

The defendants' argument

[44] By the supply contract in each year, Applemax undertook to provide indicative market realisations. The full provision reads:

> Applemax will advise the Supplier of the indicative market realisations anticipated for each Export Pool, with the final realisations being confirmed at the time the final payment is made (refer section 3.4). Any realisation advised under this clause is indicative only and Applemax shall not be liable for any loss suffered by the Supplier if the indicative realisation is not achieved.

[45] The defendants say that Freshmax engaged in misleading and deceptive conduct in terms of the Fair Trading Act 1986 by failing to provide Oak Glen with accurate indications as to the likely prices to be achieved for Oak Glen's fruit. They say that in reliance on Freshmax's inaccurate indications Oak Glen incurred the cost of picking and processing the fruit, only to lose money on the sale. Mr Kerr submitted that the parties may not contract out of the provisions of the Fair Trading Act 1986 : see *Smythe v Bayleys Real Estate Ltd*.[6]

[46] Mr Kerr referred to two of the sales singled out in Mr Alcock's evidence: russet grade New Zealand Beauty and the smaller Braeburns. He said these were examples of misleading indications. He noted that the smaller Braeburns is primarily presented as an allegation of a set price contract. But, he said, were the Court to find that a price indication rather than a set price contract had been involved, then the Fair Trading Act requirements would apply to this sale as well as to the russet grade New Zealand Beauty.

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6 *Smythe v Bayleys Real Estate Ltd* (1993) 5 TCLR 454 at 472.

Discussion

[47] For Freshmax, Mr Keall again pointed to the parties' express agreement that indicative market realisations were indicative only, not creating liability for loss. Although liability under the Fair Trading Act could not be excluded by contract, this express agreement must count against any suggestion that reliance upon achieving the full indicated price would be reasonable. Mr Keall's submissions invited the conclusion that the Fair Trading Act could not apply in this case because, by their nature and by virtue of the provisions of the contracts, Freshmax's predictions were provisional and unreliable.[7] This is arguably reinforced by the fact that the price indication given for the russet grade by email on 23 February 2010 expressly began thus:

> Can pack a russet grade in conjunction with C1 with the following price indications: ...
>
> (emphasis as in the original email)

[48] In other words, Freshmax (over and beyond the contractual provisions) emphasised the indicative nature of the figures it provided. The defendants offered no significant analysis of the prices which Oak Glen received or of the market generally. A successful argument for breach under this head, given the expressly indicative nature of price indications, would require a substantial degree of price analysis and seasonal analysis. Oak Glen's case under this head relies primarily on the difference between the absolute level of the indication and the absolute figure received. Such a discrepancy of itself is unlikely, particularly given the market issues in play, to amount to evidence of a breach of the Fair Trading Act. I however refrain from determining the matter on that basis as the same quantification issue arises as for most other grounds of opposition.

[49] Oak Glen has not provided a detailed analysis which would enable the Court to find any particular quantification of loss is arguable under this head. (I leave to one side the smaller Braeburns on which the defendants, at least in a summary judgment context, are able to succeed on a different ground of opposition).

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[7] Judicial support for such an approach may be found in *Kewside Pty Ltd v Warman International Ltd* (1990) ATPR (Digest) 46-059 at 53,222.

Opposition ground 4 – Freshmax debited Oak Glen's loan account when paying advances

The defendants' argument

[50] Under the arrangements between the parties, Oak Glen could ahead of the supply or sale of fruit obtain the use of Freshmax's money in at least two situations. First, it could obtain a crop advance by way of security over its apple crop, such advances being the specific subject matter of the 2009 and 2010 loan contracts. Secondly, it could obtain within the season "seasonal funding" which was through advances on specified tranches of apple or pear production. The latter advances incurred no interest. The former incurred the interest specified in the loan contracts.

[51] Mr Alcock made a number of complaints in relation to the debiting of seasonal advances, none of which stands up to scrutiny when analysed.

Discussion

[52] First, there is a suggestion in his evidence that advance payments made under the loan contracts were occasionally treated by Freshmax as additional loans. In other words, Freshmax would be "double-dipping" when it came to calculation of interest. Freshmax has however provided a full and satisfactory reconciliation of payments. The defendants have provided no analysis to support a double-dipping theory.

[53] Secondly, by reference to an example of advances paid on 20 August 2009 (totalling $10,995.50 plus GST), Mr Alcock deposes that Freshmax debited Oak Glen's account on the loan contract instead of treating the payment as a seasonal advance which it should have been. The evidence for Freshmax (unchallenged) indicates that from August 2009 the interest on the 2009 advances had been frozen. This is confirmed by statements and contemporaneous documents. No incorrect interest calculation could occur because there was no interest calculation.

[54] This ground of opposition also faces the difficulty that the express terms of the supply contracts for each season provide that the final payment applicable to any

given fruit would be arrived at by deducting certain costs from the on-sale value. One express deduction is for "any advance payments made in connection with this agreement for any fruit" and another deduction is for "any costs incurred by Applemax ... in relation to the ... onsale of fruit" (with the contract giving examples). So long as there is no double-dipping by Freshmax (and I find no evidence of such) Freshmax has at least two answers to Mr Alcock's complaints, first that it was entitled to make the deduction calculations in the way it did and secondly, that had it not made the deductions at the time then Oak Glen would have been faced with a correspondingly greater outstanding balance of the principal yet to be paid.

[55] Given the absence of any reasonable substantiation of breach or of quantifiable loss under this head I find that this ground of opposition must also fail.

Opposition ground 5 – Freshmax's poor documentation caused Oak Glen increased costs and tax liabilities

The defendants' argument

[56] Under a heading in his evidence "Failure to provide records and reconciliations" Mr Alcock commences criticisms of Freshmax in these words –

> Freshmax made things difficult for Oak Glen by its tardy approach to paperwork and the reconciliation of transactions.

[57] While he then (in seven further paragraphs) makes some more specific comments about "the inadequacy and lateness of Freshmax's documentation" the evidence when read fully does little more than reassert the opening comment that "Freshmax made things difficult for Oak Glen". There are some matters of a factual nature which the Court cannot, on this summary judgment application, resolve. Mr Alcock deposes that invoices were often received long after the event and in a way which made it impossible to reconcile deposits and invoices. There is a significant difference between his evidence and Ms Clubb for Freshmax, she deposing that full details, including a copy of the working papers, were sent in relation to each payment at the time it was made or processed. Mr Alcock rejects that evidence. I cannot in this context resolve the difference. There is certainly evidence which

suggests that Freshmax's documenting of transactions and statement of account was not always passed on to Oak Glen in a timely way.

The documented example of complaint

[58] There is a single documented example provided by Mr Alcock of a written complaint sent at the time in relation to accounting documents. In his submissions, Mr Keall contrasted that single item of complaint to the "rapid and comprehensive responses" which Freshmax provided to queries and requests, of which I accept there are repeated examples in the documentary record. Again, it is not possible in a summary judgment context to determine the extent of any delay in dealing with any queries raised by Oak Glen. It is likely to count against the defendants' suggestions of damage-causing delay that they do not appear to have taken the basic step of documenting what they now say were repeated failures by Freshmax to deal promptly and accurately with queries. The defendants refer to a single example of an invoice (AX1212 for $1,915) which had to be reversed. When the matter was raised, Freshmax accepted there had been an error. Mr Alcock deposes that this transaction (wrongly entered) was "typical of the way Freshmax dealt with Oak Glen throughout the parties' relationship". That sort of allegation, wide-ranging and hanging off a single example, is not atypical of the approach taken by Mr Alcock in his evidence. It constitutes a bare allegation. There is no basis in the evidence which the defendants have actually provided to conclude that the way in which the reversed invoice (AX1212) came about was typical of the way Freshmax operated.

Oak Glen's GST difficulties

[59] Again, under this heading I return to the issue of quantification of loss. The potential loss from this head of opposition, on which Mr Kerr focussed, was the cost and increased tax liability flowing from the re-filing of GST returns. The defendants' position is that because Oak Glen did not receive the necessary invoices and other information in a timely way it had to estimate for the purposes of its GST returns. Mr Alcock says that it was not possible to tell what Oak Glen had earned for the sale of fruit, what costs it had incurred and what it owed Freshmax under the loans. To take that evidence one step further the defendants obtained an affidavit

from their accountant, Richard Wimsett. Mr Wimsett refers to difficulties which arose in relation to GST returns. He deposes that Oak Glen has had to file GST returns in the absence of the necessary documentation. He says:

> There is a high probability that the GST returns that have been filed are inaccurate, and that they will need to be re-filed.

[60] His affidavit was sworn and filed in February 2012. I accept that there is often some difficulty for a defendant in providing detailed evidence of allegations when responding, under time pressures, to a summary judgment application. However, a hearing was not reached until the very end of May. There was ample opportunity for the defendants to obtain leave to file updating evidence if the completion and filing of GST returns had borne out the defendants' concerns. As it is, complete uncertainty remains as to the allegation of likely inaccuracy. As importantly, there is also a complete lack of evidence as to any increased GST liability. The matter is left on the basis of Mr Wimsett's evidence that the re-visited GST returns "may give rise to an increased GST liability". No analysis was provided with the February 2012 affidavit or subsequently to substantiate that.

[61] In these circumstances I do not find that the defendants have provided any proper basis for the Court to conclude that there may be an arguable set-off in relation to GST liability.

Oak Glen's general accounting costs

[62] Mr Wimsett has deposed:

> Already Oak Glen Orchards Limited has incurred significant additional accountancy fees directly as a result of Freshmax's inadequate or tardy provision of documentation. These will be well in excess of $5,000 + GST.

[63] As I have recorded, the defendants' allegations of inadequate or late provision of documentation cannot be dismissed as beyond argument at this point. Mr Wimsett's evidence ties his additional accounting costs to that cause. The only sum he has referred to in evidence as representing a cost in that regard is $5,000 plus GST. He has referred to the costs being "well in excess" of that sum but what is meant by that is unclear. He did not provide an up-to-date figure after his affidavit

was sworn on 20 February 2012. The appropriate sum to exclude from a summary judgment quantum on this account is accordingly $5,000.

Opposition ground 6 – Freshmax breached a fixed price agreement for Braeburn

The defendants' argument

[64] I have referred to Mr Alcock's evidence concerning Oak Glen's smaller Braeburns.

[65] In the notice of opposition the argument as to the smaller Braeburns relates to a particularised pleading which reads:

> In breach of contract the plaintiff failed to at all times endeavour to obtain the best possible price for Oak Glen's fruit. The prices paid by the plaintiff for Oak Glen's fruit were not the best possible prices, and were unreasonably low.

[66] Similarly, within Mr Alcock's evidence, the Braeburns were discussed (as I have noted (above [37]) as one of two examples of "appalling sale prices for Oak Glen's fruit".

[67] Mr Alcock's evidence went further than that, in that he deposed that in March 2009 in two conversations, Ian Chapman of Freshmax had agreed with Mr Alcock to pay a set price of $20 per carton for the smaller Braeburns. Mr Alcock deposes that the words "set price" were expressly used and that Mr Chapman stated that Freshmax already "had it sold at $20". Mr Alcock deposed that because Oak Glen had between 700 and 800 cartons of such Braeburns he anticipated receiving just under $16,000 for that particular fruit. He says that in early January 2010, when Oak Glen had already locked itself in to Freshmax for another season, he was appalled to learn from Mr Chapman that Freshmax would pay only $4.29 (representing the price sold in a pool with fruit from other growers) rather than the $20 per carton agreed.

[68] Mr Alcock said that before January 2010 he had received no indication that Freshmax would renege on the set price agreement or that Oak Glen's Braeburns would be sold with other grower's fruit.

[69] He exhibits an email sent to Mr Chapman on 11 January 2010 which reads:

> Hi there, You will recall telling Donald and I that the small B/B would be local marketed at a set price of 20.00 per tcn to go to Woolworths/ Countdown.
> Tony binned this stuff of, graded and sized and sent it on for bagging. At no time has the word pool been mentioned untill [sic] today. Regards Mike

[70] Mr Chapman replied by email the same day. He stated:

> At no time have I said a "set price of..."
>
> Indicative would have been as far as I could have indicated as pricing changes regularly and we aim not to have Amax fruit going in on Promotional weeks.

Mr Chapman deals with some other matter in the email before concluding:

> Hope that clarifies for you.

[71] Mr Alcock does not refer to going back to Mr Chapman for clarification or for any other point of discussion on the email exchange.

[72] He produces evidence showing 714 cartons sold at a price of $4.29 per carton (achieving a net return to Oak Glen of $2,902.11).

[73] Thus, although the concept of a separate contract or a variation of contract was not specifically identified as a particular in the notice of opposition, the allegation of a specific agreement in relation to the smaller Braeburns was clearly identified in the defendants' evidence. Freshmax, in its evidence in reply, set out to deal with the allegation of a set price agreement.

Freshmax's arguments in reply

[74] Mr Chapman filed evidence in reply. He deposed in relation to the allegation of a set price agreement:

> I had many discussions with Mr Alcock about the indicative price of various pipfruit varieties and sizes. I would not have agreed to a set price or even referred to a set price for any fruit. Agreeing to a set price with a grower would be risky as Freshmax cannot set the eventual on sale price.

[75] With reference to the email exchange on 11 January 2011 Mr Chapman deposed:

> When Mr Alcock suggested in his 11 January 2011 email that I had told him and Mr Steedman that Braeburn would be marketed locally at $20.00 per carton and replied the same day reiterating that *At no time have I said "set price of …".* Mr Alcock did not disagree in a further email or in any subsequent discussion. There was no allegation of a fixed price agreement in any of the letters sent by his solicitors in 2011.

[76] Mr Chapman adds that the relevant invoice (sent to Oak Glen in February 2010) showing the sale of the smaller Braeburns at $4.29 per carton did not then elicit from the defendants a complaint about any set or guaranteed price agreement being breached.

Mr Ryan's evidence

[77] The filing of Mr Chapman's reply affidavit led to the filing of a further affidavit on behalf of the defendants. The affidavit was accepted in evidence. It is from Oliver Ryan, the sole director and shareholder of a separate orcharding business in Hawke's Bay. Mr Ryan had been shown Mr Chapman's reply evidence in relation to not agreeing to a set price. Mr Ryan deposes that his company had been sued in December 2011 in relation to the same production years (2009 and 2010). His company had had the same standard form arrangements as Oak Glen. He deposes that his company filed opposition to Freshmax's summary judgment application, that Freshmax then withdrew that application, and that the proceeding is now transferred to the District Court to be dealt with as an ordinary proceeding.

[78] Mr Ryan deposes that one of his company's main defences was that Freshmax had dishonoured a verbal (meaning oral) fixed price agreement to purchase Braeburns for $20 per carton. He refers to negotiations in which he stipulated a fixed price of $20 per carton for Braeburns. Mr Chapman and Mr Shenz of Freshmax refused to agree a fixed price. The parties then negotiated on the possibility of a minimum price agreement which Mr Ryan would not accept. He says that in June 2010 Mr Chapman finally relented and agreed to buy his Braeburn apples for a fixed price of $20 per carton. He says that the agreement was not recorded in writing. He says that Freshmax subsequently reneged on its agreement

to pay a fixed price. His company netted returns of between $5.22 and $15.35 per carton, well below the agreed fixed price of $20 per carton. He says that apart from Braeburns, Freshmax had also entered into fixed price agreements in relation to Granny Smith and Royal Gala, with those agreements being honoured.

[79] Mr Ryan referred also to written fixed price proposals he had received from Freshmax in April 2010 in which Freshmax had stipulated that quality claims would be the responsibility of the grower. Mr Ryan did not accept those proposals as he wanted the fruit off his hands with certainty, which is what he states was agreed in the case of the Braeburns, Granny Smiths and Royal Galas.

[80] Mr Kerr submitted that the defendants' position was credible and not to be dismissed in a summary judgment application. He noted the degree of corroboration from Mr Ryan which indicates that Freshmax has been prepared to offer growers fixed prices for at least some apple varieties (including, in the case of Mr Ryan, his Braeburns).

Discussion

[81] For Freshmax, Mr Keall emphasised the distinction between the concept of a fixed price (by which Freshmax would be purchasing the fruit outright at a price that is certain, such as $20) or a minimum price guarantee, by which, (as in the example of the proposals exhibited by Mr Ryan) Freshmax would be agreeing on a set price which would then be subject to adjustments. Mr Keall submitted that any oral agreement of the kind deposed to by Mr Alcock would offend the express agreement that no variation of the supply agreement would be binding unless set out in writing and that such a variation is also inconsistent with Mr Chapman's uncontested rejection of any set price arrangements in the January 2010 email.

[82] Given the conflicting evidence, I am unable to resolve in a summary judgment context whether such an agreement was reached or not. The defendants are entitled to point to Mr Ryan's allegations of fixed price agreements which did occur to add weight to the possibility that in relation to precisely the same sort of contractual relationship, Freshmax had been prepared to depart from the protections

of the supply contracts as circumstances called for this. The fact that Mr Alcock did not go back to Mr Chapman in response to his January 2010 email response may weigh against Mr Alcock in an assessment of his evidence at trial but it cannot, in a summary context, be decisive. Similarly, the fact that the supply contracts have a provision that no amendment or variation of the agreement will be binding unless set out in writing and signed by the parties cannot be decisive. There may be a number of arguments which the defendants can put forward to justify enforcement of an oral agreement. One may be that the oral agreement was in fact a stand alone agreement and not a variation or amendment. Another may lie in the proposition that clauses which appear to preclude variations unless they are made in writing are not conclusive of themselves.[8]

Outcome

[83] In these circumstances Freshmax has not established that the defendants have no arguable defence in relation to the value of the Braeburn contract. The defendants have an arguable set-off which can only be determined at trial.

[84] Although witnesses and counsel initially presented varying calculations as to the potential value of the set-off, its value had become clear by the conclusion of submissions.

[85] The maximum value of the defendants' set-off claim is $11,216.94. This is arrived at because the defendants allege a shortfall of $15.71 per carton ($4.29 as against the promised $20). There were 714 cartons. Hence $11,216.94.

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[8] J Burrows et al *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at 19.3.1.

Bringing together the matters of alleged defence

[86] For the reasons developed, the defendants have arguable set-offs (for which they have provided a proper evidential foundation) in two sums –

(a)	Loss on alleged fixed price contract	$11,216.94
(b)	Accountancy costs	$5,000.00
		$16,216.94

[87] The provisions of r 12.2(1) permit the Court to enter summary judgment on part of a claim where that is indisputable: see *Australian Guarantee Corporation (NZ) v McBeth.*[9]

[88] This is an appropriate case in which to enter summary judgment for the indisputable sums. The calculation of that (in terms of principal) is:

(a)	Plaintiff's claim in terms of invoiced charges	$96,566.93
(b)	Less set-off allowance	$16,216.94
(c)	Entitlement to summary judgment	$80,349.99

Interest and costs

[89] Freshmax claims interest on the outstanding balance at the interest rate provided in each contract, namely the Base Lending Rate (commercial) as published by the plaintiff's bank pursuant to the terms of cl 1.4 of each loan contract down to the date of judgment. The plaintiff is entitled to such interest. The orders I make will include an order for interest but, pursuant to discussion with counsel, will reserve leave to apply for the fixing of the interest sum if agreement is not reached.

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9 *Australian Guarantee Corporation (NZ) v McBeth* [1992] 3 NZLR 54 (CA).

[90] The plaintiff is also entitled to costs upon the basis that they follow the event. Again, pursuant to discussion with counsel at the hearing I will reserve costs. Freshmax relies upon provisions in the guarantees which provide for the recovery of legal fees on a full indemnity basis. Mr Keall accepted that there was no equivalent provision in the principal contracts. Costs remain in the discretion of the Court. It would be an unusual outcome if the Court were to order solicitor/client costs against the guarantors but costs on some lesser basis against the principal obligant. My preliminary view is that, taking into consideration both the contractual provision as against the guarantors and a degree of lack of success (by $16,106.94) for the plaintiff, a costs award on a 2B basis together with disbursements as fixed by the Registrar might be appropriate. Leave will be reserved to the parties in relation to costs.

Orders

[91] I order:

(a) There is judgment for the plaintiff in the sum of $80,349.99 plus GST (if any);

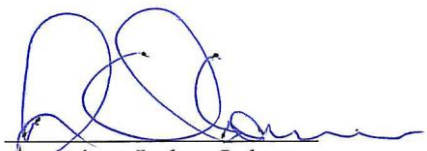
(b) There is judgment for interest (in relation to the 2010 year) on the sum of $80,349.99 calculated from the date of the advances making up that sum down to today calculated at the rate of interest equal to the Base Lending Rate (commercial) as published from time to time by the plaintiff's bank, with leave to counsel to file memoranda as to the quantification of interest, such memoranda to be filed with 15 working days.

(c) There is judgment for interest (in relation to the 2009 year) in the sum of $7,847.45.

(d) Costs are reserved, with counsel to file memoranda if the quantum of costs is not agreed, the plaintiff's memorandum to be filed and served within 10 working days and the defendants' memorandum to be filed

and served within 15 working days (memoranda to be no longer than five pages).

(e) The proceeding, as it affects the balance of the plaintiff's claim, is adjourned to a telephone conference at ***12 noon, 17 July 2012 (Associate Judge Osborne***), with counsel to file by ***13 July 2012*** a memorandum as to any agreement reached or proposals made for the cost-effective disposal of the balance of the plaintiff's claim.



Associate Judge Osborne

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