



IN THE DISTRICT COURT
AT MANUKAU

CIV 2004-092-866

BETWEEN

UTI NEW ZEALAND LIMITED
Plaintiff

AND

REPLAS LIMITED
Defendant

Hearing: 9 June 2004

Appearances: R Bell for Plaintiff
M Keall for Defendant

Judgment: 30 July 2004

DECISION OF JUDGE NICOLA MATHERS

Introduction

[1] The plaintiff seeks summary judgment. The defendant has counterclaimed. The plaintiff, in addition to its claim for summary judgment, has sought an order that the defendant's counterclaim be heard separately from the summary judgment application. I have heard both applications.

[2] The defendant does not deny the plaintiff's claim so if I grant the plaintiff's application, (that the defendant's counterclaim be heard separately), it is inevitable that the plaintiff will succeed on its summary judgment.

Facts

[3] The plaintiff is a freight forwarding company. The defendant regularly uses its services. In July, August and September 2003 the plaintiff invoiced the defendant for eight separate transactions for a total of \$12,427.09. The defendant accepts that

sum properly represents the services provided to it by the plaintiff but has filed a counterclaim for \$19,532.81 claiming inter alia an equitable set-off.

[4] The defendant's counterclaim is based upon an allegation that in a shipment in early 2003 the plaintiff failed to insert a "Maquila" clause in the Master Bill of Lading which caused the goods to be re-entered and which caused a net loss to the defendant of \$19,245.38.

[5] A number of affidavits have been filed as to the nature of the trading between the parties and the nature of the factual dispute in the counterclaim. Reference is also made to the conditions of contract and in particular the "no set off clause". The defendant disputes strongly the applicability of the conditions of contract. The affidavits also refer to issues of credit being given by the plaintiff to the defendant in the course of its regular dealings.

Decision

[6] It is not my role to resolve, at this stage, disputed facts unless the alleged factual basis is "inherently improbable" either in itself or by "contemporary" documentation. Therefore for the purposes of this decision I accept that there is a proper factual dispute between the parties concerning the counterclaim. There are also disputed issues as to the course of trading between the parties and issues of credit and I therefore accept these are in dispute.

[7] Furthermore, I do not intend to embark upon a consideration of the "no set off" clause as there are significant factual matters to be resolved before the legal position can be established.

[8] Both parties accept the counterclaim arises out of a separate contract. Strictly speaking therefore, there is no set-off but merely a counterclaim. However, *Grant v NZMC Limited* [1989] 1NZLR 8, a Court of Appeal decision is clear authority that "equitable set off is available only where the competing claims are inextricably connected and it would be unjust to allow the plaintiff to have judgment without bringing the cross claim to account."

[9] The plaintiff says that there is a common law rule prohibiting set-off against freight charges but it does seem, without attempting to finally decide the issue, that this rule has not been followed in New Zealand and indeed there is a reserved decision in this Court of *Lep Freightways International Limited v Advanced Door Systems Limited*, Christchurch District Court MP 4605-4609/96 16 May 1996 where the English Common Law rule was not followed. That case had similarities to the present and summary judgment was refused.

[10] I have to exercise a discretion based upon the legal principle set out in *Grant v NZMC*. Taking into the account the totality of the affidavits, the course of dealing between the parties, the timing of the counterclaim dispute, the issues of credit and despite the issue of separate contracts, I am of the view that the equitable set-off is available to the defendant to require the claim and counterclaim to be heard together. In other words I am satisfied on the particular facts of this case that the competing claims are inextricably connected and that it would be unjust to allow the plaintiff judgment at this stage without bringing to account the defendant's counterclaim.

[11] Purely from a common sense commercial view, and putting aside any legal considerations, where parties regularly contract with each other, it would seem unjust to press one transaction in favour of another disputed one.

[12] The result is that the plaintiff's interlocutory application that the defendant's counterclaim be heard separately fails and the plaintiff's application for summary judgment also fails and both claims should be heard together.

[13] This matter could well benefit from a judicial settlement conference and I therefore direct that the matter be allocated a half day settlement conference at the earliest possible date.

[14] Costs will be reserved at this stage.

Nicola Mathers
District Court Judge