

**IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TAURANGA MOANA ROHE**

**CIV 2016-470-000175
[2017] NZHC 2522**

BETWEEN

DONALD CAMERON RODEE
TRADING AS MATAHUI AVOCADO
RESORT SPA
Plaintiff

AND

FRESHMAX NZ LIMITED
Defendant

Hearing: 21 September 2017

Appearances: S Fellows for the Plaintiff/Respondent
M Keall for the Defendant/Applicant

Judgment: 16 October 2017

JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN

*This judgment was delivered by me on
16.10.17 at 3:30pm, pursuant to
Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar
Date.....*

[1] Mr Rodee grows avocados for export. The defendant (Freshmax) markets and exports avocados.

[2] Mr Rodee has sued Freshmax claiming inter alia that Freshmax has breached their contract agreement regarding the payment due from the export of Mr Rodee's avocados. Their agreement, dated 1 December 2014 provided that the commission payable on the export sale of Mr Rodee's avocado product would be 7 per cent. Mr Rodee asserts it was agreed his avocados would not be in the pool of avocados as was generally the case for those types of arrangements because he supplied sufficient to fill whole containers. Also, he said it was his expectation there would be no goods and services tax (GST) involved in the export of that crop because he would continue to own it until it landed in Australia and payment was received in Australian dollars.

[3] The 2014 – 2015 Avocado Export Shipment Schedule provided by Freshmax showed the total sale return of exported fruit from Mr Rodee was NZ\$1,064,623.85 when, based on Mr Rodee's historical experience and estimates of volume of fruit removed from his property, expected sales would be in the region of \$1.5m.

[4] Mr Rodee pleads he has endeavoured to obtain information and clarity regarding Freshmax's sale details, and has sought information as to how the calculations of payment have been made, but that this has not been provided.

[5] Mr Rodee's claim pleads a breach of contract asserting Freshmax assured him that his avocados would not form part of a general pool for sale and that ownership of the fruit would not transfer until delivery to its overseas destination and that Freshmax's conduct in that process was misleading or deceptive and in breach of s 9 of the Fair Trading Act 1986.

Statement of defence

[6] By its defence Freshmax acknowledges Mr Rodee's avocados were not included in any pool and agrees Mr Rodee approached Freshmax with the request for his fruit in the 2014 – 2015 season to be purchased on a shipment by shipment basis at a reduced rate of commission of 7 per cent and was to export that fruit to Global Fresh Australia Pty Ltd in Australia.

[7] Freshmax agrees a commission of 7 per cent would be payable by Mr Rodee and says it has no knowledge of Mr Rodee's expectation that no payment of GST would be involved. Rather, it says, it adhered to the terms of their written agreement. It does not agree it provided a schedule showing the total sale was to be in the sum that Mr Rodee claims – because it has no knowledge of the source of that information Mr Rodee has produced which he says supports his claim.

[8] Freshmax says Mr Rodee was paid in accordance with the terms of the written agreement and denies therefore Mr Rodee's claims of losses suffered. It is Freshmax's position that Mr Rodee understood from the outset that his avocados would not form part of the general pool and that payments would be made, as per his request, on a shipment by shipment basis in line with appendix 1 of their agreement. That apart, Freshmax denies Mr Rodee's allegations. Freshmax claims Mr Rodee received his contractual entitlement and full documentation to support that and therefore suffered no loss. It says in accordance with their agreement Mr Rodee's fruit was sold and title thereto was transferred at the time that fruit was accepted by Freshmax in New Zealand and the transaction was accordingly subject to GST.

Strike out/summary judgment application

[9] Freshmax applies to strike out Mr Rodee's claim or for summary judgment dismissing that claim. It says no reasonably arguable cause of action has been pleaded and/or the claim is frivolous or vexatious and/or is an abuse of the process of the Court. In particular it is pleaded the background allegations of a claim are vague and/or are speculative and/or that allegations of breach of contract and misleading or deceptive conduct and/or negligent misstatement are imprecise, sparse or unintelligible.

[10] Freshmax claims there is an insufficient disclosure of alleged wrongdoing causing losses and that those claims are unquantified, and therefore cannot succeed because Freshmax has performed its obligations under the contract and Mr Rodee has received the payments that were due to him under the contract and as the evidence of Ms Clubb and Mr Redwood confirms.

[11] Ms Clubb is Freshmax's financial controller. She confirmed that under the usual supply agreement Freshmax was required to use its best endeavours to obtain the best realisation for the growers fruit and that the fruit from most suppliers was allocated and exported as part of a large pool and that under the standard supply agreement for avocados a grower had the option of opting out of the pool and proceeding on a shipment by shipment basis – as happened in the case of Mr Rodee who had negotiated a reduction of Freshmax's standard commission right of 10 per cent at a price which was the gross realisation of the fruit less freight and insurance costs. Its terms and conditions, she said, are well known in New Zealand including Freshmax's standard 10 per cent commission for exported product. Under the usual supply agreement she noted the grower's payment is finalised once all amounts for shipment have been received including freight, commission, insurance, compliance and survey costs, finance costs, packaging and labelling, promotion, statutory levies and packing costs.

[12] Mr Rodee she says, signed such a contract by which Mr Rodee agreed to receive payment on a shipment by shipment basis along with the modified rates of commission and advances and in terms of which Mr Rodee's avocados were duly delivered to Freshmax and exported to Australia on a shipment by shipment basis and for which a final estimated total of NZ\$1,059,128.80 was paid, and evidence of which was provided. Payments, she says, were made to Mr Rodee between 29 January 2015 and 18 June 2015, details of which were provided to Mr Rodee's accountant.

[13] When a query was received from Mr Rodee's solicitors it appeared to Ms Clubb that the lawyers had not been aware of the details earlier supplied to Mr Rodee's accountants. It appeared to Ms Clubb that at about that time Mr Rodee had engaged the services of new accountants.

[14] Sometime later and at the request of by Mr Rodee's solicitor's further documents were provided containing details of levies, packing and storage, and clearing charges incurred. As well details were provided of onshore costs including levies and packing and cool store costs. In addition there were it is claimed standard contractual deductions including freight, insurance and commission costs. Ms Clubb comments that she does not believe that the export shipment schedule provided by Mr Rodee's solicitors relates to the avocados supplied by Mr Rodee to Freshmax and says she has not found any export shipment schedule in Freshmax's system or any data that matches the information provided by the solicitor's schedule. She says that she has extracted all the sales revenue detail and export deductions from Mr Rodee's systems relevant to Freshmax's 11 avocado shipments and collated that into a single spreadsheet.

[15] Ms Clubb provides supporting evidence by reference to details of data (covering five pages) to prove charges and costs, and calculations by way of debit in final calculations. That evidence, she says, confirms direct and indirect costs incurred relating to Freshmax's management obligations and outlays on behalf of suppliers and supports her claim that Mr Rodee received the amount he was entitled to under the parties' contract.

[16] Mr Keall submits that claims on behalf of Mr Rodee rely on contradictory evidence; and was limited to vague allegations; that therefore the first cause of action was improbable and uncorroborated and did not sufficiently address Freshmax's evidence in opposition.

[17] It is Mr Rodee's position that there is a reasonably arguable cause of action and that Freshmax's evidence is insufficient to support its claims.

Considerations

[18] It was conceded by counsel for Mr Rodee that Mr Rodee's expectation of not having to pay GST was incorrect. That concession is proper for clearly although delivery was to Australia, supply was made from the Rodee property and at that time was subject to GST obligations when payment was received.

[19] Mr Rodee's interpretation of contractual obligations appears to ignore those which were the subject of the written contract that he signed. He says he had not read that. The evidence is clear that it was written for some time before it was signed by him.

[20] Rather Mr Rodee's perception of contractual obligations relies on his recall of what he says Mr Redwood of Freshmax told him before Freshmax's services were engaged. Mr Rodee says Mr Redwood promised a continuity of those services previously supplied by Just Avocado Limited (Just Avocado). However Mr Rodee has not provided any details regarding that former arrangement much less in relation to those terms he said were promised to have been provided on behalf of Freshmax.

[21] Also, his claims of an arrangement that enabled payment without GST are imprecise and appear to rely upon his perceptions and not actual fact. He believes he was entitled to expect increased returns but he is vague about why that was so. This summary judgment application on behalf of Freshmax requires Mr Rodee to provide the best evidence he can. In this case that amounts to nothing more than recollections or perceptions. He does not actually say that he confirms the allegations contained in his statement of claim. It seems to the Court in the circumstances there is no reasonable prospect of Mr Rodee being able to advance a better prepared pleading.

[22] Mr Rodee's case relies upon the Court conceding that this is a proper case to hear the evidence of two persons regarding what their written contract meant as opposed to what in writing it clearly stated. Evidence that Mr Rodee provided to challenge the accuracy of Freshmax's charges was indeed not evidence at all of Freshmax's charges but of, apparently, Just Avocado.

[23] The acceptable evidence is that Freshmax has sufficiently and appropriately provided full details to endorse the measure of payment made to Mr Rodee pursuant to the parties' agreement.

[24] The recent concession made regarding liability for payment of GST itself undermines a claim that the parties written contract was subject to oral agreement to variations.

[25] Mr Rodee's case is that, in effect, he expected to receive more than he did – but he does not clearly explain why that was so – despite having received full detail of Freshmax's charges and deductions. It is not clear what further evidence Mr Rodee expects.

[26] Mr Rodee's claim appears to proceed on the basis that there may be evidence disclosed subsequently that will support his claim. There is no clear indication of the existence of that information to prove any claim at all, much less in an amount of about half a million dollars.

Conclusions

[27] The Court accepts the statement of claim discloses no reasonably arguable cause of action because allegations of verbal changes to a written contract are vague and speculative and are insufficiently supported by evidence. Allegations of breach of contract and deceptive conduct are, as Mr Keall submits, imprecise and sparse to the point of being unintelligible. Claims of loss have been insufficiently quantified.

[28] The acceptable evidence is that Freshmax performed its obligations under the contract between the parties and that Mr Rodee received the payments due to him under the contract for the avocados supplied.

[29] Even assuming that claims of fact contained in the statement of claim are true, it is clear in this case those allegations are untenable.

[30] It is the Court's view that all three pleaded causes of action must be struck out. But, even if the Court had not struck the causes of action out it would instead have granted summary judgment to Freshmax because Freshmax has provided sufficient evidence to convince the Court the claim could not succeed. Evidence provided on behalf of Freshmax is not disputed and Mr Rodee's claims of an oral

agreement to amend the terms of the parties' written agreement are neither credible nor supported by acceptable evidence.

[31] Therefore, had the proceeding not been struck out the Court would have dismissed all pleaded claims.

[32] Costs to be awarded to Freshmax will be fixed upon application.

Associate Judge Christiansen