

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

**CIV-2012-441-000817
[2013] NZHC 1406**

BETWEEN SANTA ROSA ORCHARDS LIMITED
 AND OLIVER THOMAS RYAN
 Appellants

AND FRESHMAX NZ LIMITED
 Respondent

Hearing: 6 June 2013

Counsel: DM Kerr and SC Cowan for Appellants
 MG Keall for Respondent

Judgment: 13 June 2013

JUDGMENT OF RODNEY HANSEN J

*This judgment was delivered by me on 13 June 2013 at 4.00 p.m.,
pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date:

Solicitors: Bramwell Grossman Lawyers, Hastings
 Fyers Joyce, Auckland

Introduction

[1] In proceedings removed from this Court to the District Court at Napier, the respondent (Freshmax), a fruit exporter, seeks to recover the balance of a loan to the first appellant (Santa Rosa) from whom it purchased fruit and the second appellant, a director of Santa Rosa and the guarantor of the loan. Santa Rosa claims a set-off for sums alleged to be due for fruit supplied and sold by Freshmax on its behalf.

[2] In the District Court, Santa Rosa sought to enforce an order for discovery made against Freshmax. Freshmax responded by seeking further particulars of the claim for set-off. Judge Mackintosh made orders requiring Santa Rosa to provide further particulars and extended the time for compliance with the discovery order until the further particulars had been supplied. Santa Rosa appeals against her decision.

Further background

[3] Freshmax is a large scale fruit exporter. It provides seasonal loans to fruit growers from whom it purchases fruit. It then deducts the proceeds of sale of fruit from loans made to growers. Santa Rosa supplied Freshmax with fruit for sale over the period 2007 – 2010 and was made seasonal loans. Mr Ryan, as the director of Santa Rosa, guaranteed the loans.

[4] In 2011, Freshmax applied in the High Court for summary judgment against Santa Rosa and Mr Ryan, seeking repayment of the outstanding balance of the loan of \$47,365.57 plus interest. Santa Rosa claimed a set-off on the basis that Freshmax had failed to properly account to Santa Rosa for the proceeds of sale of fruit supplied. It claimed, among other things, that Freshmax had deducted commission in excess of the contractual rate and costs that had not been incurred or in excess of what had actually been incurred.

[5] In February 2011, Freshmax agreed to withdraw its summary judgment application and to the transfer of the proceeding to the District Court. A condition of Santa Rosa's agreement to this course was that Freshmax would provide full

discovery in the District Court and seek appropriate directions to that end and for the ongoing progression of the proceeding.

[6] On 2 May 2012, pursuant to a consent memorandum, Judge Rea made a discovery order against Freshmax in the following terms:

All documentation regarding the respondent's sale of and the returns received for fruit grown by Santa Rosa Orchards Limited together with documentation substantiating all deductions made by Freshmax NZ Ltd from the sale proceeds of Santa Rosa Orchard Limited's fruit such as the deductions made for "quality compliance", "finance", "internal logistics" and the like

[7] Freshmax served its list of documents on 24 August 2012. Santa Rosa complained that it failed to include documents required to be discovered by the terms of the consent order. Freshmax responded with an application to strike out parts of Santa Rosa's amended statement of defence and counterclaim, to provide particulars of aspects of its counterclaim and to vary the discovery order.

Judge's decision

[8] Judge Mackintosh identified the issues as follows:

- (a) Whether Freshmax was bound by the discovery order of 9 May 2012.
- (b) Whether the scope of discovery orders are determined by the order itself or by the pleadings.
- (c) Whether there was sufficient particularity in Santa Rosa's amended statement of defence and counterclaim to enable Freshmax to comply with the discovery order.
- (d) Should Santa Rosa have to further particularise its claim before discovery could occur.

[9] Judge Mackintosh decided that the scope of discovery should be determined by the issues as defined in the pleadings. She took the view that Freshmax was not bound to make discovery in accordance with the consent order; the scope of discovery would be determined by the pleadings.

[10] Judge Mackintosh found that Santa Rosa's pleading lacked sufficient particularity. She ordered Santa Rosa to provide further particulars of its set-off and

counterclaim and extended the time for Freshmax to comply with the discovery order until 30 working days after full particulars had been provided.

Grounds of appeal

[11] Mr Kerr submitted that the Judge erred in not requiring Freshmax to comply with the terms of the discovery order. He said the agreement to provide discovery in terms of the consent order was a condition of Santa Rosa's agreement to the proceeding being transferred to the District Court. He argued that there is no justification for Freshmax resiling from its agreement.

[12] Mr Kerr further submitted that Santa Rosa's amended statement of defence and counterclaim is pleaded with sufficient particularity and is not an obstacle to Freshmax complying with the discovery order. Further, he asserted that without discovery, Santa Rosa would be unable to provide the further particulars sought.

Freshmax's position

[13] Mr Keall defended the Judge's decision. He argued that a compliant pleading was necessary in order to determine the proper scope of discovery. He noted that there had, in any event, been no final ruling on that issue. He took issue with the claim that further particulars could not be provided in advance of discovery. He said the discovery order did not in any way relieve Santa Rosa of the obligation to properly particularise its allegations.

Discussion

Particulars

[14] The application for further particulars was directed to the following part of the amended statement of defence and counterclaim dated 31 July 2012.

Set Off

The First and Second Defendants repeat the foregoing and say they have a set-off against the Plaintiff as follows:

Commission and Charges

- 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 Defendants' fruit.
- 20 The Plaintiff has not provided the substantiation sought.
- 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.
- 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.
- 26 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.

[15] In the course of argument, it became clear that the allegations in paras 17 – 22 that Freshmax deducted commission from payments made to Santa Rosa at a rate in excess of what had been agreed did not accurately express Santa Rosa's claim. The commission was in fact deducted at the agreed rate of 10 per cent. Santa Rosa's complaint is not that the commission paid was excessive but that Freshmax failed to account for the full amount it received on the sale of Santa Rosa's fruit. Mr Kerr acknowledged that this part of the counterclaim must be repleaded.

[16] The further particulars sought by Freshmax and ordered by the Judge are as follows:

Paragraph 19 of counterclaim:

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 21 of counterclaim:

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 rates 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 24 of counterclaim:

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 26 of counterclaim:

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 cost the reasons why the defendant says the plaintiff has not in fact incurred that cost.

[17] The further particulars sought are primarily directed to establishing the particular transactions to which each allegation is directed. Santa Rosa supplied fruit to Freshmax over a period of four years. Freshmax is plainly entitled to know which of the numerous transactions – between 100 and 150 invoices I was told – the claims relate to. These particulars will need to be provided in relation both to the pleading that will replace the so-called commission cause of action and those sought in relation to paras 24 and 26 of the amended statement of claim.

[18] The only further particular ordered which, in my view, cannot properly be sought is subpara (c) in relation to para 26. Unlike the other particulars sought, I cannot see how Santa Rosa could provide those particulars in advance of discovery.

It is not clear to me, in any event, that such particulars are necessary to inform the Court and Freshmax of the basis of Santa Rosa's claim.

Discovery

[19] I am satisfied that Judge Mackintosh was right to resist Santa Rosa's application to require Freshmax to comply with the order for discovery in advance of particulars being provided. Often, there is no reason why discovery should not proceed pending the provision of further particulars. Indeed, it is often the case that further particulars cannot be provided until the opposing party has completed discovery. However, the further particulars sought by Freshmax are necessary to delineate the scope of discovery. On the current state of the pleading, it is not clear which transactions are the subject of complaint. Freshmax cannot be expected to comply with the order until the scope of Santa Rosa's claim is clarified in this respect.

[20] The issue then arises as to whether, once particulars are provided, Freshmax should be required to comply with the literal terms of a discovery order which it agreed to without knowing the scope of Santa Rosa's counterclaim and without a proper appreciation of the practical difficulties of compliance. Those difficulties have been explicated at length in an affidavit by Freshmax's financial controller, Michaele Clubb. She explains that Freshmax operates pooled account sales of fruit supplied by growers. Sales are pooled by variety. Santa Rosa's fruit was sold in pools which included fruit from other growers. Sales and costs are grouped and distributed or apportioned to all growers in the pool at the same per unit rate with the exception of quality issues which go directly back to the grower when they can be identified.

[21] Discovery of all documents relating to Santa Rosa's sales and costs could require wide ranging disclosure giving rise to confidentiality issues (by virtue of the need to disclose sales of other growers' fruit) and, as Ms Clubb describes them, the enormous logistical difficulties of retrieving and assembling the information. As a scoping exercise, the retrieval of discoverable documents for the 2010 season was undertaken. For that season, the supply of fruit from Santa Rosa was small and of

only one apple variety. Despite that, it took three people more than a week to locate and copy the documents.

[22] Freshmax clearly has a strong case to be relieved from the rigours of literal compliance with the consent order. There is specific power to do so. Rule 3.58 of the District Court Rules provides that the High Court Rules apply to discovery in the District Court. Rule 8.17 of the High Court Rules provides:

8.17 Variation of discovery order

- (1) Subject to rule 7.18, a party may apply for an order varying the terms of a discovery order.
- (2) The variation may be granted by a Judge on the ground that—
 - (a) compliance or attempted compliance with the terms of the order has revealed a need for a variation; or
 - (b) there has been a change of circumstances that justifies reconsideration.¹

[23] Clearly, if full and literal compliance with the order is as onerous as Ms Clubb anticipates, the power to vary will be available. At this stage, however, as discussed with counsel at the hearing, the focus must be on providing initial discovery sufficient to substantiate the basis on which prices and costs were calculated. I would expect this to include contemporary documents that are sufficient to at least provide an accounting of the way prices and costs were arrived at. The question of whether a further layer of discovery is required or can be justified may be explored following discovery on that basis.

Result

[24] The appeal is allowed and the orders made in the District Court modified to provide as follows:

- (a) Within 21 days, Santa Rosa is to amend paras 17 – 22 of its statement of defence and counterclaim to plead its claim that Freshmax failed to account to it as it was contractually required to do for the sale price obtained for fruit sold on its behalf.

¹ Subpara (1) of the Rule is inapplicable as r 7.18 has been repealed.

- (b) Santa Rosa provide within 21 days, the further particulars sought at paras 7, 8 and 9 of the notice requiring further particulars of set-off and counterclaim dated 16 July 2012 in relation to paras 21, 24 and 26 of the amended statement of defence and counterclaim excluding, however, subpara (c) of the particulars sought in para 9.

[25] Santa Rosa having succeeded in part, there is no order for costs.