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BETWEEN POTATO PRODUCTS INTERNATIONAL
LIMITED (In Liquidation)

Plaintiff

A N D LEONARD JOHN REYNOLDS
AND OTHERS

Defendants

Hearing : 5th June 1984

Counsel : A.S. Menzies for Plaintiff in support
D. Wilson for Defendant L.J. Reynolds to oppose

Judgment : 5th June 1984

(ORAL) JUDGMENT OF BARKER, J.

Before the Court today are two applications by the plaintiff against the only defendant who has participated in this action, the defendant Leonard John Reynolds.

The first was for an order striking out the statement of defence on the grounds that an order for discovery which was served on the defendant almost two years ago, had not been complied with. Mr Wilson appeared as counsel for the defendant today and produced an affidavit of documents.

I therefore dismiss the application but order costs in any event to the plaintiff of \$150. In my view, a period of 2 years is quite unconscionable within which to file an affidavit of documents. This affidavit should have been filed long ago.

Mr Menzies made it clear that he would be likely to file an application for further and better discovery based on the documents included in the privileged segment of the affidavit of documents. On the face of them, it is difficult to justify privilege for some of these documents which are not part of the files of solicitors and counsel. However, that is not the matter which is strictly before the Court at the moment.

The other motion which is before the Court is an application by the plaintiff for further and better particulars of the defendant's counterclaim.

The claim by the plaintiff is for specific performance of a written agreement for sale and purchase of a business or damages in lieu. The counterclaim by the defendant is for rescission or cancellation of this agreement on the grounds of fraudulent misrepresentation made by the alleged agent of the plaintiff, one Kenneth Douglas Mexted; the letter seeking further particulars was written in October 1983; the response of the defendant came in a memorandum provided by Mr Wilson to the Court today. Mr Wilson asked that the matter be adjourned on the basis that senior counsel for the defendant was out of the country; I refused this application; it seemed to me that a motion for further particulars was well within the competence of Mr Wilson who is an experienced counsel; I saw no reason why the plaintiff should be delayed even further in bringing this action on for trial.

In his submissions, Mr Wilson noted correctly that a claim for fraud must be clearly pleaded and that an allegation of this gravity must be articulated with precision. Certain

partial response to the plaintiff's letter requesting particulars, was provided in the written submissions; what I propose to do now is to outline a few areas where I think proper particulars should be given and require that the defendant file an amended statement of claim.

Question 1: What specific information did Kenneth Douglas Mexted fail to disclose and suppress in relation to the agreement for sale and the variation thereof?

My ruling is that the pleading must state the specific information that Mexted failed to disclose and suppress.

Question 2: In what manner, at what times, in which capacity and to whom did Kenneth Douglas Mexted fail to disclose and suppress the information referred to in paragraph 11(iii) of the counterclaim?

I agree with Mr Wilson that if the allegation is of suppression, then it is not very easy to state how there was a suppression other than in the manner suggested in the submissions.

Question 3: What specific misrepresentations were made by Kenneth Douglas Mexted, to whom, in what manner and in what capacity as to whom or which persons and/or the number of such persons as were proposing to purchase as purchasers or partners the said business of the plaintiff company?

The answer is different here. In my view, the defendant must state the specific misrepresentations made by Mexted, the dates and the persons to whom the misrepresentations were made. If the defendant is unable to state places, times

and persons in his pleading, then he must say so. It sometimes happens that interrogatories are needed to provide all the answers. One would hope that with this litigation, proceeding at a somewhat leisurely pace, the parties will not find it necessary to apply for interrogatories but will get on with the substantive hearing.

Question 4: In what manner, at which times, in what capacity and to whom did Kenneth Douglas Mexted misrepresent the true financial position of the plaintiff company?

In my view, this question should be answered but may well have been answered by the responses suggested by counsel in an amended pleading; dates and times where available are to be stated.

Question 5: In respect of which assets of plant and machinery and equipment were the misrepresentations made referred to in paragraph 11(vi) of the counterclaim?

The defendant states that he has certain information in his possession but that it was supplied by an employee of Mexted; the information is more available to the plaintiff. However, this is not an answer. The defendant has the burden of making an allegation; if he is not able to state it with precision or if it is to be discovered from the plaintiff on interrogatories or whatever, then he should say so in his pleadings.

Question 6: In what manner, at which times, in what capacity and to whom did Kenneth Douglas

Mexted make the misrepresentations referred to in paragraph 11(vi) of the counterclaim?

I think that in an amended pleading, it will be made clear in what capacity Mexted was acting. I should have thought that some "omnibus" pleading to the effect, for example, that Mexted was at all material times acting as agent for the plaintiff, might cover this particular complaint.

Question 7: Which of the plant referred to in paragraph 11(vii) did not belong to the plaintiff and in what respects were the values shown thereon false and untrue and grossly inflated?

Particulars should be granted as sought except that the defendant needs only to say that the values were grossly inflated or untrue; it is a matter of evidence whether that allegation can be made out.

Question 8: What specific misrepresentations were made by Kenneth Douglas Mexted in connection with the allegations contained in paragraph 11(viii) of the counterclaim?

Provided that the allegation makes it clear to whom and when Mexted made the misrepresentations, I think that the particulars already supplied are appropriate.

Question 9: In what manner, at which times, in which capacity and to whom did Kenneth Douglas Mexted make the misrepresentations referred to in paragraph 11(ix) of the counterclaim?

The memorandum indicates that there will be an amendment which will satisfy the plaintiff's complaint.

The memorandum supplied by Mr Wilson indicates that an amended counterclaim is envisaged. I suggest that this document should not be long in coming. I therefore order that the defendant file an amended statement of counterclaim within a period of 28 days.

The question of costs is reserved.

R. D. Barker, J.

SOLICITORS:

Grove & Darlow, Auckland, for Plaintiff.
McCaw, Lewis, Chapman, Hamilton, for Defendant.