IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

97/968

CP 495/96

BETWEEN ORIGINAL BEEF BACON INTERNATIONAL LTD

Plaintiff

A N D HEINZ-WATTIE LTD

Defendant

Hearing: 11 June 1997

Counsel: GJ Toebes for the plaintiff
WA Smith and MW Thorley for the defendant

Judgment: 2 - JUL 1997

(RESERVED) JUDGMENT OF MASTER KENNEDY-GRANT

Solicitors for the plaintiff
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Introduction

This is a summary judgment application for a declaration that the defendant wrongfully repudiated a licence agreement entered into between it and a subsidiary of the plaintiff on 5 October 1995. The interest of the plaintiff's subsidiary in the licence agreement has been assigned to the plaintiff and notice of the assignment given to the defendant.

Counsel agree that if I grant the declaration sought it will be necessary for me to give directions with regard to the trial of the issue of quantum.

The defendant was previously known as Wattie Frozen Foods Ltd. I have amended the name of the defendant to reflect the change.

The contract

The contract comprises a fronting page, five pages of text and a one-page attachment.

The following are the relevant clauses:

> *Background*
>
> ....
>
> *B* *OBB is in possession of a recipe for the curing of Original Beef Bacon.*
>
> *C* *OBB and WFF has entered with an approved manufacturer (sic) pursuant to which the manufacturer has agreed to manufacture and process the Product for WFF.*
>
> *D* *WFF and OBB have agreed to enter into this Licence to record the terms upon which WFF may market and distribute the Product using the Trademark*
>
> .....
>
> *2 Licence*
>
> .....
>
> *2.1* *OBB hereby grants to WFF a licence to market, manufacture and distribute the Product in the Territory and the use of the Trade Mark on the terms of this Licence.*
>
> ....
>
> *3 Duties*
>
> *WFF shall at its sole costs (sic):*

(1) *Use it's best endeavours to promote the sale, distribution and marketing of the product generally in accordance with the Beef Bacon Product Launch Plan 1995 and by regular and continuous advertising and solicitation of the general public prospective customers and retailers within the territory and shall periodically prepare and forward to OBB such reports as OBB reasonably requires.*

.....

5 Product

5.1 Both parties agree that they will procure that the approved manufacturer manufactures all Product in accordance with good manufacturing processes and in compliance with all applicable statutes and regulations and otherwise in accordance with specifications stipulated by WFF from time to time and to the account of WFF and at the cost of WFF.

5.2 WFF shall market and sell the product on such terms, including price as WFF & OBB determine.

5.3 Both parties agree that a six month transition period is required by WFF to take over full product sourcing and production of the product.

5.4 OBB will provide the cure pre-mixed to WFF & OBB's selected manufacturer this will be paid for by WFF on payment terms that are arranged by OBB's cure supplier.

5.5 Payment for and responsibility of all manufactured products, is at the sole cost of WFF.

...

9 Term and Termination

9.1 This Licence shall be for a term of 5 years and thereafter shall continue on an annual basis until terminated by 6 months written notice by either party.

9.2 Either party ("Non-Defaulting Party") may terminate this Licence by written notice if:

9.2.1 the other party fails to perform any of its obligations under this Licence and such failure is not remedied within 14 days of hand delivered written notice from the Non-Defaulting party

9.2.2 there is a change in control of the other party without prior written consent of the Non-Defaulting party, consent not unreasonably withheld

9.2.3 certain defined performance objectives are not met as defined in the launch plan

9.2.4 OBB has the right to Assign this agreement to any Nominee with written consent from WFF, consent not unreasonably withheld.

The one-page attachment is headed "*Beefbacon Product Launch Plan - 1995*". It has seven columns, headed respectively "*May - 1995*" and "*July - 1995" to "Dec - 1995*". Various steps in the testing, evaluation and marketing of the product are set out in the various columns. The attachment is signed

by both parties and bears a handwritten notation by one of the employees of the defendant, Mr Lambert:

> "*Given the fact that this schedule is now 6 months behind*"

The termination

There is no doubt that on 12 March 1996 the defendant terminated the licence agreement by writing the following letter:

> *The Directors*
> *Original Beef Bacon Company*
> *C/- Larry Woods*
> *255 Great North Road*
> *Auckland*
>
> *Dear Larry*
>
> *It is with considerable regret that I write to confirm our conversation of last Friday in Auckland with yourself, Louise Barton and myself.*
>
> *Despite our best concentrated efforts and considerable expense, we find ourselves in a situation where to proceed with any further development of beef bacon would be detrimental to Wattie Frozen Foods financial performance.*
>
> *Accordingly, we wish to revoke our agreement and contract with the Original Beef Bacon Company and in doing so formally afford you the opportunity of assigning our interest to another party.*
>
> *I suggest that we meet in the near future to discuss the matter of a repayment of the advance on royalties yet to be earned, some $20,000.*
>
> *Good luck with your project and the future.*
>
> *Yours sincerely*
>
> *Stewart Jewell*
> *Business Manager, Food Services Division*

The defendant contends that it was entitled to terminate the agreement under cl 9.2.3 of the agreement because the initial test trial (which was the

first step provided for in the one-page attachment to the licence agreement) was not successful.

In support of this contention, the defendant submits that the success of the first test was to be judged on the basis of the following extracts from the defendant's business plan for the product, dated May 1995 and made available to the plaintiff at about that time:

Future Plans

...

- *A test-market worth two tonne of product is to be carried out within the New Zealand Foodservice market using 3 major distributors for Watties Frozen Foods - Creans Auckland, Rotorua and Hamilton*
- *Once the results of the test-market are ascertained and the product has proven to be a strategic and profitable addition to the current Watties Frozen Foods range , the concept and the proof of market acceptance will be re-presented to the Wattie Frozen Foods New Zealand Retail department. A decision will be reached regarding the responsibility of launching the Beef Bacon product into Retail outlets.*
- *The product will also be launched on a Nationwide basis in NZ Foodservice.*

and:

- *Measurement of success will be the rate and the time-frame the two tonne of product was sold in Foodservice, and the information generated from both questionaries (sic) will indicate any further improvements to be made and the demand in the market.*

The one-page attachment to the contract of 5 October 1995 was originally part of the defendant's business plan.

The defendant contends that it is entitled to rely on these extracts either because the entire business plan or, alternatively, those extracts are part of the contract entered into between the parties on 5 October 1995 or because the extracts are identifiable as the "*certain defined performance objectives*" referred to in cl 9.2.3 of the contract. Both these arguments are rejected by the plaintiff, which contends that the contract is limited to the 5 pages of text and the one-page attachment headed "*Beefbacon Product Launch Plan - 1995*" and that cl9.2.3 refers to the contents of the attachment and to that only.

The affidavits

The plaintiff's application for summary judgment is supported by two affidavits. The first, by Mr G D Kinraid, establishes the assignment to the plaintiff referred to above. The second, by Mr M Pugh, goes to the merits of the matter.

The defendant has filed three affidavits, by Messrs STF Jewell and JMJ Lambert and Ms LR Barton.

The plaintiff has filed a second affidavit by Mr Pugh in reply.

Two days before the hearing of this application the defendant filed a second affidavit by each of its three deponants. Mr Toebes, for the plaintiff, objects to the admission in evidence of these affidavits. I heard counsel on this point at the beginning of the hearing and indicated that I would receive the affidavits *de bene esse* but that, if I came to the conclusion that my decision would turn on what was in the further affidavits, I would grant the plaintiff the opportunity to reply to them if I considered it necessary to do so.

The proper approach to an application for summary judgment

I approach my determination of this application on the basis laid down by the Court of Appeal in *Pemberton v Chappell* [1987] 1 NZLR 1 at 3/49-4/17:

> *At the end of the day R136 requires that the plaintiff "satisfies the Court that a defendant has no defence". In this context the words "no defence" have reference to the absence of any real question to be tried. That notion has been expressed in a variety of ways, as for example, no bona fide defence, no reasonable ground of defence, no fairly arguable defence. See eg Wallingford v Mutual Society (1880) 5 App Cas 685, 693; Fancourt v Mercantile Credits Ltd (1983) 154 CLR 87, 99; Orme v De Boyette [1981] 1 NZLR 576. On this the plaintiff is to satisfy the Court; he has the persuasive burden. Satisfaction here indicates that the Court is confident, sure, convinced, is persuaded to the point of belief, is left without any real doubt or uncertainty. ... Where the defence raises questions of fact upon which the outcome of the case may turn it will not often be right to enter summary judgment. There may however be cases in which the Court can be confident - that is to say, satisfied - that the defendant's statements as to matters of fact are baseless. The need to scrutinise affidavits, to see that they pass the threshold of credibility, is referred to in Eng Mee Yong v Letchumanan [1980] AC 331, 341 and in the judgment of Greig J in Attorney-General v Rakiura Holdings Ltd (Wellington, CP 23/86, 8 April 1986).*

The real issue

The real issue in this case is whether the plaintiff has established that the defendant's claim that it was entitled to terminate the licence agreement is unarguable.

In order to reach the conclusion that the defendant's claim is unarguable, I consider it necessary, having regard to counsel's arguments, to determine whether the following propositions are arguable:

(a) The contract includes the entire business plan of May 1995 or, alternatively, the extracts from it quoted in the section of this judgment headed The termination.

(b) The *"certain defined performance objectives"* referred to in cl 9.2.3 of the contract are unable to be found in the one-page attachment to the document headed *"Beefbacon Product Launch Plan - 1995"*.

(c) That being so, the Court must ask itself where (if at all) they may be found and is entitled to hold that they can be found in the extracts from the business plan quoted above.

(d) Failure to meet the *"certain defined perfomance objectives"* entitled the defendant to terminate the contract rather than obligated it to remedy the problems causing the lack of success.

(e) If failure to meet the objectives entitled the defendant to terminate the contract, the objectives were not in fact met.

My findings

(a) The contract includes the entire business plan of May 1995 or, alternatively, the extracts from it quoted in the section of this judgment headed The termination

(b) The *"certain defined performance objectives"* referred to in cl 9.2.3 of the contract are unable to be found in the one-page attachment to the document headed *"Beefbacon Product Launch Plan - 1995"*.

(c) That being so, the Court must ask itself where (if at all) they may be found and is entitled to hold that they can be found in the extracts from the business plan quoted above.

I propose to consider these three propositions together because the view I take of them will determine the view I take of the content and meaning of the contract of 5 October 1995 (subject only to answering the

question whether failure to meet the defined performance criteria entitled the defendant to terminate the contract).

The plaintiff's argument, as already noted, is that the contract consists in and of the fronting page, 5 pages of text and the one-page attachment to which I referred in the section of this judgment headed The contract. It argues that the *"certain defined performance objectives"* referred to in cl 9.2.3 are to be found in, and only in, the one-page attachment which forms part of the contract so defined.

The defendant, for its part, argues:

(i) that the contract is not limited as contended for by the plaintiffs but includes the entire business plan prepared by the defendant in May 1995 (from which the one-page attachment headed *"Beefbacon Product Launch Plan - 1995"* was extracted) or the particular extracts from the plan quoted in the section of this judgment headed The termination;

(ii) that the *"certain defined performance objectives"* referred to in cl 9.2.3 of the contract cannot be found in the one-page attachment to the contract and must therefore (if they are to be found at all) be found in the defendant's business plan as a whole or, alternatively, in the particular extracts from the business plan quoted in the section of this judgment headed The termination.

Evidence has been given by the deponents for the parties as to the parties' intentions in regard to what should be comprised in the contract. Their evidence is directed to establishing the correctness of their respective arguments as to the content of the contract. This evidence is admissible for this purpose; it is not admitted as an aid to the

interpretation of the contract but as an aid to identification of the constitutent parts of it.

That said, however, the starting point must be the document itself. The only other reference to *"the launch plan"* in the contract is cl 3(1) of the contract, which refers to the *"Beef Bacon Product Launch Plan 1995"* without identifying it by date or expressly identifying it as the one-page attachment to the contract. The one-page attachment bears a heading which differs from the reference in cl 3(1) in two respects that can only be considered minor:

(i) the words *"Beef"* and *"Bacon"* are run together to form one word;

(ii) there is a dash between the word *"Plan"* and the date *"1995"*.

In contrast, the May 1995 business plan which the defendants contends forms part of the contract, was headed *"Wattie Frozen Foods - Business Plan for Original Beef Bacon -"* with no date following. There is no reason, on the face of the admitted contract, to think that the document referred to in cl 3(1) is the May 1995 business plan rather than the one-page attachment to the contract. Nor, in my view, is there reason, on the face of the document to interpret the reference to *"the launch plan"* in cl 9.2.3 differently.

It seems to me, therefore, that, on the face of the document signed as the contract, the document described in cl 3(1) of the contract must be taken to be the document of which a copy forms the one-page attachment to the contract. The description of the document in cl 3(1) is apt to describe the one-page attachment and there are no indicators that any other document is meant.

Unless, therefore, the defendant applies successfully to rectify the contract, that is an end of the matter so far as the identification of the contents of the contract (as opposed to its interpretation) is concerned. The defendant has not given any notice that it seeks rectification and such a possibility was not discussed in argument; but I think it is proper for me to consider the matter on the basis that such an application could be made. If I consider that possibility I cannot, on the evidence before me, hold that such an application would be unsuccessful.

On that basis, I am unable to hold that the first proposition (see (a) of the heading to this section of my judgment) is unarguable.

If, contrary to my finding in the immediately preceding paragraph of my judgment, the proposition that the May 1995 business plan or the relevant extracts from it formed part of the contract of 5 October 1995 is unarguable, it becomes necessary for me to consider the second and third propositions set out at the head of this section of my judgment.

So far as the second proposition is concerned, the plaintiff's argument is this:

(i) cl 9.2.3 refers to " ... *performance objectives ... as defined in the launch plan*";

(ii) the one-page attachment to the contract which is headed *"Launch Plan"* sets time-performance objectives;

(iii) there are other provisions in the contract dealing with quality and price objectives (eg, the definition of *"Product"* in cl1.1 and cl 3.1, 3.2, 5.1 and 5.2);

(iv) there is, therefore, no need nor justification for arguing that cl 9.2.3 has any wider application than the time performance; and

(v) the proposition that the *"certain defined performance objectives"* referred to in cl 9.2.3 of the contract are unable to be found in the one-page attachment is therefore unarguable.

The defendant counters this by arguing:

(i) that the expression *"certain defined performance criteria"* does not aptly describe the timing of performance but is, rather, an expression used of quality and profitability; and

(ii) that the plaintiff's interpretation results in an overlap between cl 9.2.3 and cl 9.2.1

I am unable to give great weight to the second of the defendant's arguments because this is not a contract drawn by lawyers but one drawn by laymen. The defendant's first argument, however, does, I think, have force. The expression *"performance objectives"* obviously has to be understood in terms of the industry or activity in the context of which it is used. In the context of the food manufacturing industry, the expression is, in my view, arguably more aptly used of quality and profitability than of time. At the very least, it is as aptly used of quality and profitability as of time.

That being so, the one-page attachment which only sets time objectives arguably does not alone contain the *"certain defined performance objectives"* of cl 9.2.3.

I turn now to consider the third position, which is that, if the *"certain defined performance objectives"* in cl 9.2.3 are not to be found, and found only, in the one-page attachment to the contract, the Court will

consider whether they can be found elsewhere and will find them in the business plan.

I have no doubt that, if the Court were to find that the *"objectives"* referred to in cl 9.2.3 were not contained in the attachment to the contract (and were not to be found elsewhere in the contract), it would consider, if asked to do so by the parties or one of them, whether the *"objectives"* could be identified by reference to known material outside the contract, on the ground that, if what the parties meant by that term could be identified, the contract would thereby be saved from uncertainty.

I therefore find that the third proposition also is arguable.

(d) Failure to meet the *"certain defined perfomance objectives"* entitled the defendant to terminate the contract rather then obligated it to remedy the problems causing the lack of success.

Failure to meet the *"certain defined performance objectives"* did not entitle the defendant to terminate the contract if the failure occurred as a result of its failure to meet its obligations under the contract. If, however, the failure to meet the *"objectives"* was not brought about by its default in any respect, it was entitled to terminate the contract.

Mr Toebes argued that in terms of the opening words of cl9.2:

> *"Either party ("Non-Defaulting Party") may terminate this Licence ..."*

the defendant was only entitled to terminate the contract if it had "clean hands", ie if it was itself free from fault. I accept that argument to the

extent stated in the previous paragraph but not otherwise. Where the situation giving rise to the right to terminate has been brought about by the failure of the terminating party to perform its obligations under the contract, the defaulting party will be unable to take advantage of the situation. Where its fault has not brought about that situation, its fault is irrelevant to the right to terminate (although it may give rise to a cross-claim for damages for breach of contract).

There is clear conflict on the evidence as to what happened after the contract was entered into and as to the situation that existed at the time the contract was terminated by the defendant. That being so, it is not possible for me to dismiss the argument that what happened was not the defendant's fault.

I am therefore not satisfied that the fourth proposition is unarguable.

(e) If failure to meet the objectives entitled the defendant to terminate the contract, the objectives were not in fact met.

It follows from what I have said in the last subsection of this judgment that I cannot dismiss this proposition as unarguable either.

(f) Conclusion

In the light of these findings I am not satisfied that there is no defence on liability

I record that I have made the findings in the previous subsections of this section of my judgment without referring to the defendant's second set of affidavits.

Orders

I therefore dismiss the plaintiff's application for summary judgment and direct the Registrar to place the matter in the Chambers List on 18 July 1997 at 10 o'clock for the making of timetable and other orders as appropriate. Counsel are to file and serve memoranda no later than 1.00pm on 15 July 1997.

MASTER T KENNEDY-GRANT