

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

**CIV 2008-419-582**

BETWEEN                      DAVID PETER DICKINSON  
   Plaintiff

AND                              MCDONALD'S LIME LTD  
   Defendant

Hearing:            20 April 2009

Appearances: Richard Thompson for Plaintiff  
                         Richard Smedley for Defendant

Judgment:        20 April 2009

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**JUDGMENT OF HARRISON J**

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**SOLICITORS**

Galbraiths (Auckland) for Plaintiff  
Anthony Harper Lawyers (Christchurch) for Defendant

**COUNSEL**

Richard Thompson

## **Introduction**

[1] Mr David Dickinson has brought this claim against McDonald's Lime Ltd for breach of contract. He seeks damages of \$246,000 apparently for loss of profits. I must now determine Mr Dickinson's application made shortly before commencement of trial for discovery of further documents.

[2] As I shall explain, the nexus between McDonald's alleged breach and Mr Dickinson's right to damages seems legally untenable. While I am not called upon to determine whether or not Mr Dickinson's cause of action is arguable, that provisional conclusion is at the forefront of my inquiry into whether or not the further documents which he seeks are discoverable.

[3] I record that the parties have settled two other applications which were listed for determination today: first, Mr Dickinson's application for an order for non-party discovery and, second, McDonald's application for an order for security for costs.

## **Contract**

[4] As the source of Mr Dickinson's claim is purely contractual, I must record the essential terms at the outset. It is a written document dated 1 October 2001 (but which did not come into force until 2 July 2002). McDonald's is nominated as 'the supplier'; Mr Dickinson is described as 'the purchaser'. The operative part provides that:

[McDonald's] agrees to sell and [Mr Dickinson] agrees to purchase the product at the Price and on and subject to the Terms and Conditions.

[5] The product and other relevant provisions are contained in Schedule A which is recited in full as follows:

<b>The Product</b>	:	Limestone in random ('shot rock') block form of minimum size 200mm x 100mm x 60mm
<b>Quantity</b>	:	the amount advised by the Purchaser from time to time.

- Price** : \$8.00 per tonne plus GST for first term of 2 years. Thereafter adjusted with any increase in extraction costs.
- Delivery Date** : as advised by the Purchaser from time to time.
- Term** : one (2) year term commencing on the date of first purchase.
- Right of Renewal** : For a further 10 terms of 3 years each unless the purchaser cancels by notice in writing on or before 90 days prior to the expiration of the term.
- Payment** : On the 20<sup>th</sup> day of the month following invoice.
- Supply** : The Supplier will provide equipment to load the product on to the purchaser's vehicle.

#### **TERMS AND CONDITIONS**

##### **Supply and Payment**

- 1 (a) The Supplier will during the term supply product to the Purchaser in block form of a minimum size of 200mm x 100mm x 60mm by the delivery date.
- (b) The Purchaser will make Payment of the Price to the Supplier.
- (c) All risk in the product will pass to the Purchaser on Supply.
- (d) After the initial 2 year period the Price will be adjusted on the anniversary of the date of commencement either by agreement or if no agreement is possible then by automatic adjustment corresponding to the movement in the Consumer Prices Index for the relevant period.

##### **Quality**

- 2 (a) The Supplier will ensure that the product meets the Purchaser's quality standard.
- (b) If any product fails to meet the Purchaser's quality standards then the Purchaser may reject the particular product.

##### **Exclusivity**

- 3 The Supplier warrants that it will use its best endeavours, not to sell wholesale or retail the product either itself or through its directors, employees or through any related company, trust, partnership or other entity to any person north of Huntly Township, apart from the purchaser.

## Quantity

- 4
- (a) The Supplier will use its best endeavours to ensure that there is adequate Quantity of the Product available to the Purchaser.
  - (b) The Purchaser is to purchase the Supplier's product for the Term unless the quality or Quantity is inadequate in which case the Purchaser is free to obtain alternative supply.
  - (c) If the Supplier becomes aware that the Quantity or quality of the product will be inadequate for the purposes of this contract then the Supplier will notify the Purchaser immediately to enable the Purchaser to obtain alternative supply.

## Claim

[6] Mr Dickinson's statement of claim is commendably succinct. He alleges that he made his first purchase of the product on or about 2 July 2002 (the date of inception of the contract) and that he exercised rights of renewal on 30 April 2004 and 22 June 2007. He then alleges McDonald's breach and his loss in these terms:

- 6 On or about 11 June 2007 [Mr Dickinson] became aware that [McDonald's] had sold, and was still selling limestone to customers north of Huntly Township in breach of the contract.

### Particulars

- a) [McDonald's] supplied approx 3000 tonnes of limestone used in the construction and landscaping of a house being built in Mahoenui Valley Road, Coatesville.
  - b) on or about 8 June 2007 a salesman employed by [McDonald's], Duncan Clark, advised a potential purchaser that the purchaser could purchase limestone from [McDonald's] for a project in Auckland at \$90 per tonne plus GST, and that it made 'no difference to where the stone was going'.
- 7 By not referring purchasers from north of Huntly township to [Mr Dickinson], and selling limestone direct to such purchasers, [McDonald's] has breached the contract. Such breaches have caused [Mr Dickinson] loss and damage.

### Particulars

3000 tonnes @ \$90.00 =	\$270,000.00
3000 tonnes @ \$8.00 =	<u>\$24,000.00</u>
Difference	<b>\$246,000.00</b>

[7] I will revert back to these allegations later. It is sufficient to note at this stage, however, that while not expressly pleaded they appear to derive from the exclusivity provision, clause 3, which lies at the heart of Mr Dickinson's claim.

[8] McDonald's has filed a full statement of defence. It denies Mr Dickinson's allegation of breach and raises affirmative defences, first, of misrepresentation and, second, of termination on 11 July 2007. I interpolate that the latter defence in particular seems questionable, if not unarguable, by reference to clause 4(c), but that point will require determination at trial. Stronger grounds for a defence of cancellation appear available to McDonald's.

### **Discovery**

[9] Mr Richard Thompson who appears for Mr Dickinson today submits that McDonald's is bound to discover all documents relating to sales by it north of Huntly of limestone above a certain dimension which, he says, the company contracted to sell exclusively to Mr Dickinson. He recites McDonald's admission that it has sold product, but above the stated contractual dimension, to other parties north of Huntly since 2 July 2002.

[10] Mr Thompson notes that McDonald's is opposing this application on the footing that the limestone it sold to other parties falls outside the contractual definition of the product. He submits that McDonald's argument is a semantic or technical one designed to defeat the true intent of the contract. He submits that the product supplied by the company to third parties was generally within the appropriate definition; and that its essential constitution was not changed by the manner of its selection or the sale price to third parties or the purpose for which the limestone was ultimately used.

[11] Mr Thompson submits that documents relating to McDonald's sale of limestone above the standard dimension are directly relevant to a matter in question in the proceeding because they are capable of advancing Mr Dickinson's case or of damaging McDonald's defence. He emphasises that relevance is to be determined by the pleadings. Mr Thompson submits that a range of documents including sales

dockets, tax invoices, customer account holder applications, weigh bridge dockets, correspondence and accounts are discoverable.

[12] I pause to note Mr Thompson's submission that Mr Dickinson's application for further discovery is relevant to four of nine issues apparently identified by counsel for trial. In my judgment the parties have over-complicated this case. It is a straightforward claim for breach of contract. The three principal issues fall within the realms of breach, causation and loss. Other issues – such as whether or not McDonald's has supplied product to any person north of Huntly, if so its value, and whether or not there is a difference between 'the product' as defined in the contract and 'limestone' – appear immaterial.

### **Decision**

[13] Counsel have directed a great deal of argument towards a dispute about whether or not sales of limestone made by McDonald's fall within the contractual definition of 'product'. While I appreciate their industry and the resources committed by two experts into settling differences about this question, I have not found it of any assistance in resolving today's question. I repeat that the issue is relatively straightforward.

[14] In my judgment the sole question is whether or not the extra documents sought by Mr Dickinson relate to an issue that is arguable at trial. Mr Thompson relies on an argument deriving from paragraphs 6 and 7 of Mr Dickinson's statement of claim to the effect that clause 3 imposes an affirmative duty on McDonald's to refer to Mr Dickinson all inquiries for supply of the product made by parties in the region north of Huntly. In my judgment the construction Mr Thompson advances is not open.

[15] The same issue arose at an earlier hearing before Allan J on 18 February 2009. Mr Dickinson, who then appeared for himself, sought discovery of further McDonald's documents being, first, sales to a company described as Rangitoto Quarry Landfill and, second, sales to Lurcher Ltd. Allan J summarised Mr Dickinson's argument in this way:

[10] The first part of the application for further discovery seeks documents held by the defendant in respect of sales of limestone block to Rangitoto and/or Waitomo District Council. The plaintiff has made inquiries and has ascertained there have been occasions on which inquiries from persons resident north of Huntly have been referred by the defendant to Rangitoto in respect of products which the defendant says fall within the products to which he has rights under the contract. Mr Dickinson says the referral by the defendant of such inquiries to Rangitoto was in breach of clause 3, because that clause obliged the defendant to refer such inquiries to him. He seeks discovery of all documents relating to sales to Rangitoto because in that way he hopes to be able, through Rangitoto, to inquire as to the residence of persons dealing with Rangitoto on referral from the defendant in respect of products initially sourced by Rangitoto from the defendant.

[16] The Judge dismissed Mr Dickinson's application for these reasons:

[12] Mr Smedley argues that discovery ought to be refused in respect of this category of documents because they do not relate to an issue arising in the proceeding. He says that clause 3 does not create an obligation on the defendant to refer every inquiry from persons north of Huntly in respect of the product to the plaintiff; rather the contract imposes a negative obligation upon the defendant not to sell directly or through its associates, product falling within the contract to persons north of Huntly, other than the plaintiff. He argues that the mere referral of inquiries from such persons to Rangitoto does not amount to a breach by the defendant of clause 3.

[13] In my opinion that argument is soundly based. Clause 3 is designed simply to ensure that the defendant does its best not to compete with the plaintiff by engaging in the selling of product falling within the contract to persons north of Huntly. It cannot be construed as requiring the defendant to refer any inquiry for product from any person north of Huntly to the plaintiff.

[14] That construction fits within the commercial matrix that underpins the contract. Mr Dickinson is under no obligation to purchase any minimum quantity of product from the defendant. It would be unusual for a defendant in those circumstances to covenant on its part to refer each and every inquiry to the plaintiff.

[15] Given the view I take of clause 3, it follows that the plaintiff has not been able to demonstrate that referrals made by the defendant to Rangitoto are relevant to an issue arising in the proceeding, because such referrals do not themselves amount to a breach of the clause, nor could they have led to a breach.

[17] While Mr Dickinson sought discovery of a category of documents relating to supply to Rangitoto Quarry, the same principles arise here. Allan J had to determine whether or not it was arguable that clause 3 provided Mr Dickinson with the degree of affirmative exclusivity for which he now contends. I respectfully agree with the Judge.

[18] The structure of the contract reflects its purpose. Mr Dickinson, who apparently prepared the written contract or commissioned its preparation, secured a right to purchase a clearly defined product on certain terms and conditions relating principally to quantity and quality. McDonald's undertook to supply in accordance with Mr Dickinson's orders. It was essentially a supply contract which contemplated initiation and implementation through the process of Mr Dickinson placing orders and McDonald's responding.

[19] The oddly drafted so-called exclusivity provision sits awkwardly within this context. It appears to express a prohibition on McDonald's but its meaning is limited or questionable. A warranty to use 'best endeavours' not to sell a defined product north of Huntly to parties other than Mr Dickinson is meaningless. There does not appear to be any scope for a qualitative or subjective element within a negative warranty of an absolute nature.

[20] If the concept of best endeavours has any meaning, then it appears to relate to the succeeding obligation on McDonald's also to use its best endeavours to ensure adequate quantity of product available for supply. The exclusivity provision is, as Mr Thompson accepts, prohibitory in force and effect. Its plain meaning does not extend to a positive or affirmative duty on McDonald's to refer any inquiries by third parties to Mr Dickinson. Mr Thompson appeared to accept that proposition at one stage by raising the possibility of implying a term on the ground of business efficacy.

[21] Such a proposition faces major hurdles. The statement of claim does not allege the existence of an implied term. The time has well passed the deadline imposed by Allan J on 18 February for Mr Dickinson to file any applications for leave to amend by 11 March. In any event, there can be no apparent basis for reading into the contract such a provision. For example, it cannot be said to be so obvious that it goes without saying or that it is necessary to give business efficacy to the contract. It is one thing to accept a prohibition on actively selling a product outside a certain geographical area. It is another thing to accept an affirmative burden to refer inquiries from any parties within that area to the other contracting party.



[22] At the conclusion of argument Mr Thompson floated the prospect of rectification. But that option could never be open given the circumstances of preparation of the contract and the absence of any evidential basis for asserting that the contract failed to properly record the shared or common intention of the parties.

[23] Mr Dickinson's application for further discovery must fail because McDonald's documents relating to sales north of Huntly are not relevant to an arguable issue in the proceeding. This conclusion is the inevitable consequence of what appears to be a fundamental misconception of the rights and obligations arising under this contract. As Mr Smedley emphasises, Mr Dickinson placed one order for limestone product on 2 July 2002 to a value of \$101. That event brought the contract into inception. Thereafter he placed no further orders.

[24] Mr Dickinson does not allege that McDonald's breached the contract by failing to supply orders to him or by delivering goods of an inferior quality. He does not allege that he suffered loss because he had placed orders which were unsatisfied or because McDonald's supplied product to third parties north of Huntly in competition to him. He does not claim a loss of profits attributable to McDonald's denial of a right to which he was legally entitled. With one minor exception, Mr Dickinson never sought the benefit of supply. The contract existed in name but not operation. On analysis he is making what may be seen as an opportunistic claim for damages based on a strained or artificial construction of the contractual provisions.

[25] Accordingly Mr Dickinson's application is dismissed. Mr Dickinson is ordered to pay McDonald's costs and disbursements according to category 2B (but excluding costs of travel and accommodation of counsel).

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Rhys Harrison J