

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

**CIV-2006-419-001451**

UNDER the United Nations Convention on  
Contracts for the International Sale of  
Goods, and the Sale of Goods  
(United Nations) Conventions Act 1994

BETWEEN NILS SPERRE AS  
Plaintiff

AND VELA FISHING LIMITED  
Defendant

NOBLE SEAPRODUCTS TRADING AS  
First Third Party

MOON TILLET FISH CO INC  
Second Third Party

JUSTIN LEVY  
Third Third Party

Hearing: 8 April 2009  
(Heard at Auckland)

Appearances: M D Branch for the Plaintiff  
C T Gudsell QC for the Defendant  
No Appearance of or for the First, Second or Third Third Parties

Judgment: 21 April 2009

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**JUDGMENT OF DUFFY J**

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This judgment was delivered by Justice Duffy  
on 21 April 2009 at 11.30 am, pursuant to  
r 11.5 of the High Court Rules

Registrar/Deputy Registrar  
Date:

[1] This is an application by the plaintiff for leave to amend its statement of claim. At the time the application was argued, the trial was set down to commence on 20 April 2009. After the argument concluded there were further discussions between the parties that resulted in the trial being adjourned to a date to be set by the Registrar. The effect of the adjournment is that any prejudice to the defendant that may have resulted from the plaintiff being granted leave to amend its statement of claim so close to the trial date is now ameliorated by the postponement of the trial. This will affect how I deal with the plaintiff's application for leave to amend its pleading.

[2] This proceeding is about goods that were sold internationally by the defendant in New Zealand to the plaintiff in Norway. The goods concerned are 300 tons of squid, which were to be used as fishing bait. The sale of the goods is covered by the Sale of Goods (United Nations Convention) Act 1994. The plaintiff alleges the goods were defective in a number of ways. The defendant denies this.

[3] In the course of the hearing of the application for leave to amend the current statement of claim, the plaintiff withdrew some of the amendments it sought to make. It also sought to delete paragraphs 25 to 31 and paragraphs 36(c), 42(c), 49(c), 52 and 56(c) of the current pleading. I see no reason why the plaintiff cannot choose to delete some of the allegations it has made. The defendant did not suggest that it had incurred costs in addressing those paragraphs as part of its defence. In any event, costs on the application were reserved. If the deleted paragraphs have caused the defendant to incur costs in preparing to defend those allegations, the appropriate way to approach the matter is to deal with it when the trial costs are resolved.

[4] Ultimately, the only amendments it sought to make were to add to the existing paragraph 35 as additional particulars the allegations that:

- a) The squid was not graded;
- b) The squid was not as per the sample received from Noble.

[5] An amendment to the prayer for relief for the first cause of action was sought. This was to include an amount to cover the costs of disposing of the squid and costs of management time in trying to sell the squid as part of the discharge of the plaintiff's obligations to mitigate the damage it alleges it has suffered.

[6] Amendments to paragraphs 41 and 48 of the current pleading were sought to include allegations that the squid was not graded and that it was below the contracted weight.

[7] An amendment was sought to the current paragraph 54 to have it read that Article 35(2) required that the squid delivered had the same qualities as the sample and/or it was a term of the first contract and second contract that the squid would possess the same qualities of the sample.

[8] The defendant opposed the amendments. However, the thrust of the defendant's opposition was that it would be prejudiced as it would be unable to prepare a defence to resist the amendments so close in time to the trial date. The postponement of the trial removes the prejudicial impact of the amendments in that respect. Furthermore, having heard from both parties, it seemed to me that the amendments had the effect of clarifying the existing allegations by expressing them more clearly and with greater particularity.

[9] Other amendments serve to tidy up the pleading. For example, the allegations to be added to the existing paragraph 35 (first cause of action) are already pleaded for the fourth cause of action. Therefore, the defendant will already have been on notice of the need to address those allegations in relation to the fourth cause of action. The first cause of action alleges that the squid delivered was not of the description required by the contract and relies on the Sale of Goods (United Nations Convention) Act 1994 Article 35(1) UN Convention on Contracts for the International Sale of Goods (1980). The fourth cause of action alleges the squid delivered did not conform with the contract as it did not have the same qualities as the sample held out to the buyer by the seller and relies on the Sale of Goods (United Nations Convention) Act 1994 Article 35(2)(c) UN Convention on Contracts for the International Sale of Goods (1980). The evidence to address both allegations

and to resist both allegations is likely to be much. The amendment will not introduce completely new issues for the defendant to address.

[10] The addition to the prayer for relief had been foreshadowed. The additional costs are the direct result of the plaintiff attempting to mitigate its loss. The total amount is no more than NOK 50,000 (which is the currency on which the loss has been calculated). My understanding is that the defendant has always understood that this claim would be made once the quantified costs became known.

[11] There is nothing about the proposed amendments that will cause the defendant to suffer prejudice if they are permitted. There is ample time now for the defendant to respond to the proposed amendments. On the other hand, if leave to amend is refused, the plaintiff will proceed to trial with a pleading that is more obscure. That will not be in the interests of any of the parties. Moreover, the current pleading may yet be understood to cover the issues the plaintiff seeks to make clearer in the proposed amendments. The principles on which leave is granted to amend a pleading before trial are well established. In the end, it is the justice of the case tailored to the particular circumstances which must prevail: *Fordham v Xcentrix Communications Ltd* (1996) 9 PRNZ 682. In my view, the justice of the case points in favour of allowing the amendments. I am, therefore, prepared to grant the plaintiff leave to make the proposed amendments to its statement of claim.

## **Result**

[12] Leave to file an amended statement of claim setting out the proposed amendments is granted. Costs are reserved.

Duffy J

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