

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

CIV-2007-404-2545

BETWEEN	CARL YUNG GEMS LIMITED Plaintiff
AND	LEADING DESIGN JEWELLERY LIMITED First Defendant
AND	GARY DENE CAMERON Second Defendant
AND	HELEN THERESE CAMERON Third Defendant
AND	TIMOTHY ROBERT HYDE-SMITH Fourth Defendant
AND	ANTHONY EDWARD FAED MACMILLAN Fifth Defendant

Hearing: 13 October 2008

Counsel: R Parmenter for Plaintiff
M Fisher for First, Second, Fourth and Fifth Defendants
Appearance for Third Defendant excused

Judgment: 28 May 2009 at 3.30 pm

RESERVED JUDGMENT OF ASSOCIATE JUDGE SARGISSON

This judgment was delivered by Associate Judge Sargisson on 28 May 2009 at 3.30 pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date

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[1] The first, second, fourth and fifth defendants have made an application for particular discovery. The application is opposed and is before me for determination.

[2] The application as filed relates to several categories of documents that the defendants say will support their defence to the plaintiff's claim in debt and to the first defendant's counterclaim against the plaintiff. However, of all the categories the only category of documents that remains in issue is that which relates to customs documents. The other categories of documents have either been provided, or there is now an agreement to provide them and orders for that purpose, to which I will return later.

[3] Before coming to the specific order that is sought in relation to the customs documents and the grounds raised in support it is necessary to refer by way of background to the plaintiff's claim and the grounds of defence.

The Proceeding

[4] In this proceeding the plaintiff, Carl Yung Gems Limited, claims judgment against:

- a) The first defendant, Leading Design Jewellery Limited, for NZ\$154,764.26 and US\$709,253,02 for unpaid invoices arising under an agreement for the supply of jewellery, plus accrued interest of \$79,462.65.
- b) The second, fourth, and fifth defendants as guarantors of Leading Design's alleged debt.

[5] Leading Design and the guarantors essentially defend the claim on the grounds that:

- a) The agreement was converted to a joint venture agreement in October 2006 and was no longer simply an agreement to supply jewellery;

- b) The true amount of the outstanding debt owing under the agreement is substantially less than the amount the Carl Yung claims because Carl Yung significantly overcharged for the jewellery it supplied; and
- c) Leading Design has a counterclaim that exceeds the amount of the Carl Yung's claim. This arises from Carl Yung's breach of its obligations of good faith, co-operation and reasonableness under the joint venture agreement, which caused the total collapse of Leading Design's business.

[6] Leading Design accepts Carl Yung's allegation that as at October 2003 it owed approximately \$622,000 for jewellery but it alleges by way of defence that under the terms of the joint venture agreement it was agreed:

- a) Carl Yung would manufacture jewellery in China and supply it to Leading Design at prices and in accordance with specifications Leading Design and its retail customers had agreed upon;
- b) Leading Design would pay Carl Yung 80% of the price of the jewellery its retail customers had agreed to pay, and (subject to certain conditions that are not relevant for present purposes) a further 10% until the outstanding debt of \$622,000 was repaid;
- c) Carl Yung would also manufacture 9 carat gold jewellery at NZ\$12 per gram and give reasonable notice before it made any change to that price;
- d) Carl Yung would provide diamonds and gem stones at its price, again on the basis that it would give reasonable notice of any changes.

[7] Without particularising how and when each term was breached Leading Design alleges that Carl Yung breached those terms in various ways that include:

- a) Supplying jewellery below the weight that Leading Design's retail customers specified and to which Carl Yung agreed;

- b) Exceeding the agreed price for 9 carat gold jewellery by supplying underweight jewellery or charging more than the agreed price per gram;
- c) Exceeding the specified and agreed price for gem stones;
- d) Charging for jewellery based on average weight of product rather than the price agreed for specified jewellery;
- e) Exceeding the specified and agreed price for products under 2 grams; and
- f) Failing to deliver at the agreed times.

The particular customs documents that are sought

[8] In its application, as filed, Leading Design seeks an order relating to:

New Zealand Customs importation and clearance documentation for each confirmed order for jewellery made by Leading Design (showing weight, price, quantity, and description).

[9] The particular order that the application seeks is an order that Carl Yung:

- a) File and serve a further supplementary affidavit of documents that complies with consent orders made on 14 December requiring that Carl Yung deposes whether New Zealand Customs importation and clearance documentation for each confirmed jewellery order is or has been in its control, and if it has been, but is no longer, its best knowledge and belief as to when the documentation ceased to be in its control and the person who now has control of it;
- b) Pay to the first, second, fourth and fifth defendants their costs of and incidental to the application.

[10] At the hearing the reason for seeking the customs documents (and as a consequence the scope of the order sought) was narrowed. Counsel for Leading Design conceded the documents are no longer sought for the purpose of ascertaining the price Carl Yung paid to its Chinese manufacturer, as it was accepted the price or cost to Carl Yung is not a matter in issue. Rather, as explained by counsel, the purpose for seeking the documents relates to the weight of each of Leading Design's confirmed orders for gold jewellery. The argument as to the relevance of weight was in effect that if the customs documentation records the weight of each confirmed order of gold jewellery that was imported, the record will:

- a) Tend to show there was agreement that the jewellery was to be supplied according to weight; and
- b) Lend substance to Leading Design's allegations of under and overcharging if the recorded weight is not the same as the weight Leading Design says was agreed at the time the order was confirmed.

[11] For reasons I will come to, the reliance on weight as the basis for claiming that the customs documents are relevant to matters in issue is not reflected by the evidence filed in support of the application.

[12] Not surprisingly, Carl Yung accepts it has customs documentation for all of its imported jewellery, and it does not dispute that customs documents for individual confirmed orders could be relevant to matters in issue. However, its position is that it cannot provide customs documents for individual orders as they are simply non-existent and that its director, Priscilla Yung, has already filed a supplementary affidavit to this effect and complied with the consent order.

[13] Ms Yung gave her explanation about why no separate customs documentation exists for each individual confirmed order Leading Design made. She contends Leading Design's goods would come in bulk mixed with other customers goods and that goods for different orders could come in one parcel and goods for one order could be spread over several parcels. She therefore contends that it is

impossible to identify the customs documentation for any given order of Leading Design.

[14] Ms Yung's evidence lends no support to the belief that customs documentation showing the weight of Leading Design's individual confirmed orders exists. She deposed in her supplementary affidavit as to documents filed in response to the consent order:

There are no Customs Importation and Clearance documentation for each confirmed order from Leading Design. The goods came in bulk mixed with other customers goods. There are no separate documents for Leading Design's orders. Also, goods for different orders could come in one parcel but goods for one order could be spread over several parcels.

[15] Ms Yung explained further:

The last category of documents relates to any handwritten notes on behalf of the plaintiff on the Customs and Clearance documentation. As I have indicated, these specific documents do not exist. In any event the plaintiff would not be prepared to allow the defendants to see what business the plaintiff has been conducting for other customers.

[16] In a second supplementary affidavit Ms Yung deposed, without conceding their relevance, that Carl Yung is willing to disclose all of the invoices for its own gold purchases, but she argued that her evidence relating to other categories of documents including the customs documents was correct:

As for the other four categories of documents about which the applicants say we have not made full disclosure, I refer to my previous affidavit and confirm it is accurate. Mr Cameron's evidence that he has seen this document or that document (eg. In respect of Customs' import documentation, he has seen "the records of the plaintiff in relation to the transactions with the first defendant") is not true and cannot be true.

[17] Counsel for Leading Design rejected Ms Yung's approach to the customs documentation and pointed to the evidence of Gary Cameron, a director of Leading Design. He submitted that this evidence is sufficient to support the conclusion that separate customs documentation does exist that identifies the weight of Leading Designs individual orders. In his affidavit sworn on 18 April 2008 Mr Cameron deposed:

6. ...in September 2006 Toni MacMillan (the fifth defendant) and I visited the plaintiff's premises... and distinctly recall that Ms Yung showed us a complete set of documents for an order in particular the first defendant had placed. The set of documents included: the first defendant's order confirmation; the plaintiff's translation into Chinese characters of the first defendant's order confirmation; the customs import documentation; and the actual invoice from the plaintiff to the first defendant. On other occasions we were also shown the plaintiff's documents and noted each time that it was the plaintiff's standard practice in respect of each order to keep the above mentioned documents together and in New Zealand. This is a standard and necessary practice in the industry, particularly for customs purposes. It would also be impracticable to manage the records in any other way.

....

7. At paragraph 6 of the supplementary affidavit, Ms Yung has deposed that the customs' import documentation was mixed with orders of other companies and there are no separate documents for the first defendant's orders. As explained in paragraph 6 above, Mr MacMillan and I have seen on a number of occasions in New Zealand the records of the plaintiff in relation to the transactions with the first defendants. The plaintiff did retain separate and discrete records for transactions with the defendants and the documents included the customs import documents. Further, I know from my own experience as an importer and exporter of jewellery through New Zealand Customs that it is essential for an importer to retain separate documents for each customer for "duty drawback" and tax related purposes.

...

10. At paragraph 8 of the supplementary affidavit, Ms Yung has deposed that the customs' important [*sic*] documentation does not exist. As explained at paragraph 6 above Toni MacMillan and I have seen the customs' important documentation on a number of occasions. I elaborated on one of those occasions at paragraph 27 of my affidavit sworn 7 December 2007 and filed herein.

[18] In paragraph 27 of his earlier affidavit of 7 December Mr Cameron deposed:

Tony and I met with Priscilla on the 24th January 2006 [*sic* – 2007 is obviously intended] at CYG's Auckland office. I commenced the discussion on the topic of the costing of the earrings. I asked to see CYG's import documentation. Priscilla showed us an invoice for a recent order delivered from the Chinese factory to CYG in NZ. This invoice had hand written weights along side a depiction of each different style or design code. I noticed that the products were all under the specified weights and the CYG was invoicing Michael Hill at the agreed selling price even though the products were under the specified weights...

Discussion

[19] The application as filed was made under r 300 of the High Court Rules. That rule has been repealed but it is essentially the same as the current rule 8.24, which states:

8.24 Order for particular discovery against party after proceeding commenced

If at any stage of the proceeding it appears to a Judge, from evidence or from the nature or circumstances of the case or from any document filed in the proceeding, that there are grounds for believing that a party has not discovered 1 or more documents or a group of documents that should have been discovered, the Judge may order that party –

- (a) to file an affidavit stating –
 - (i) whether the documents are or have been in the party's control; and
 - (ii) if they have been but are no longer in the party's control, the party's best knowledge and belief as to when the documents ceased to be in the party's control, and who now has control of them; and
- (b) to serve the affidavit on any other party.

[20] It is not in dispute that an applicant for an order under r 8.24 must establish:

- a) Grounds for belief that the opposing party is in or has been in possession of;
- b) A document or class of document that;
- c) Relates to any matter in question in the proceeding; and
- d) That discovery is necessary.

[21] Carl Yung clearly has customs documents for the jewellery orders. However, that is not to say that Leading Design has established grounds for the belief that separate customs documentation exists that is confined to each individual confirmed order. More relevantly, I am not satisfied that Leading Design's evidence establishes grounds for the belief that the documentation includes separate customs documents

for each order of gold jewellery identifying the weight of each order. My reasons follow.

[22] First, Mr Cameron deposes at length that on a number of occasions he saw sets of documents for individual confirmed orders and that they included the customs import documents. He also asserts he knows from experience that separate customs documentation is required for individual customer's orders. However, he makes no claim that the customs documents contain details of the weight of each of Leading Design's individual confirmed orders. Indeed, he makes no claim at all as to weight in relation to the customs documents.

[23] Secondly, Mr Cameron's assertions that customs documents contain details that show the weight of individual orders rests solely on the document that he was shown on 27 January 2007, when he asked to see the customs documentation for a specific order. He says the document contains details of price and weight. It is clear the document was not a customs document. His own account is that the document was an invoice from the Chinese factory. Mr Cameron's evidence, based as it is on an invoice, is not sufficient to raise a real basis for the belief that there was separate customs documentation for each of Leading Design's gold jewellery orders that showed the weight of each order.

[24] Therefore, even if Mr Cameron's assertions were preferred over Ms Yung's and taken as sufficient to support the belief that customs documents for each individual order exists, they do not establish any basis for believing that the documents would identify the weight of each individual confirmed order.

[25] Thirdly, Mr Cameron's own evidence does not seek to show that the customs documents are sought because they are thought to relate to the matters in question in the proceeding relating to of the weight of individual orders. As the following extract of his evidence shows the reason he gave for seeking the documents was because it was thought they would show the price Carl Yung paid for the goods it imported:

In relation to the customs documentation sought, CYG does not deny that the documents exist or are in its possession, but rather it asserts that they are mixed with documents relating to other customer orders. **The customs documents sought are relevant, at the very least, because they will**

disclose the price at which the goods were imported by CYG. This will enable comparisons to be made with the order price and the invoice price, where there are differences. CYG's explanations for these differences will be relevant to the matters in question in the proceeding. [Emphasis added]

[26] Significantly, however, counsel for Leading Design accepted there is no basis for the assertion that the price Carl Yung paid would be directly relevant to questions of under or over charging. He submitted the real relevance of the documentation goes to the question of weight, as weight may show whether the price charged was an overcharge, or adjusted upwards because the gold was overweight. The submission is unsupported by the evidence.

[27] The result is that no basis has been advanced as to show the customs documents are relevant to the question of weight and related questions of under of over charging. No other basis has been pursued either to show that these documents are relevant to matters in issue.

[28] If gold jewellery was supplied by weight, and this seems likely, then it might be expected that Carl Yung checked the weight and kept records. But to assert that customs documents must be the documentation that was used to identify the weight of individual orders, when the weight of evidence shows otherwise, is not a sufficient basis to order broad ranging general discovery of customs documentation.

[29] For these reasons the order that Leading Design seeks is declined. It has not shown grounds that lead me to believe that the specific documents it seeks exist and are relevant to matters in issue in the proceeding. Nor has it addressed the issue of the necessity for an order.

[30] For completeness I note that there is a further factor that, although not determinative, also supports the conclusion I have reached. In a third supplementary affidavit filed after the hearing Ms Yung produced a sample of the customs documentation for an import entry for various detailed lines. Ordinarily that evidence would not be allowed. However, no objection has been raised and as it provides part of the discovery that is sought I have decided to allow it, subject to leave, to which I will return. The sample relates to five "detail lines", the first being "other gems", the second "green stone articles" the third "silver jewellery", the

fourth “gold jewellery”, and the fifth “silver padlock”. The documentation indicates that the total gross weight of the lines is 20 kilos, but it does not provide any breakdown showing the individual weights for each line. The document does not support Mr Cameron’s contention that customs documentation exists for each individual order or counsel’s submission that the documentation will show the weight of individual orders.

Result

[31] There will be orders as follows:

- a) The application for an order that Carl Yung is to provide a further affidavit in respect of customs documentation is declined.
- b) Leading Design has leave within 21 days or such further time as the Court allows to file a further application seeking any documents that specifically show the weight of any specified orders for gold jewellery, by reference to the specific orders in question. Alternatively it may choose to issue interrogatories within the same period, for the purpose of establishing the weight of specific orders of gold jewellery it alleges have been over or undercharged. The interrogatories should be strictly limited in number to those that are essential to establishing whether Carl Yung has undisclosed documentation other than customs documentation that records the weight of any specific orders of gold jewellery, and what the weights were.

Other categories of documents and related orders

[32] As indicated earlier, the parties have reached agreed positions with respect to the other categories of documents that were also the subject of Leading Design’s application.

[33] I deal with each in turn.

Order Confirmations

- a) Leading Design argued that Carl Yung in fact discovered only 641 order confirmations in respect of 1681 discovered invoices and that the prices were obliterated in 572 order confirmations;
- b) Leading Design now concedes it has all relevant order confirmations;

Invoices Carl Yung Issued

- c) Leading Design argued that Carl Yung has not discovered any of the invoices that Leading Design has actually paid;
- d) This is no longer pursued. Counsel reached agreement at the hearing that Carl Yung will provide an affidavit confirming all copies of invoices have been discovered, and on that basis Leading Design will no longer pursue the issue;

Invoices for Gold Purchases

- e) Leading Design argued that contrary to Carl Yung's contention, it has not discovered all gold invoices. This too is the subject of an agreed outcome and is no longer in issue. Carl Yung has agreed to disclose and undertakes to provide a folder with all of the invoices. Ms Yung has, as counsel pointed out, already deposed in a second supplementary affidavit that Carl Yung agrees to disclose a folder that contains all the invoices. She states:

I have learned since that the applicants want to see all our invoices for gold because they say that the plaintiff purchased gold in response to Leading Design's orders (the opposite of my evidence from my previous affidavit). Rather than argue about it we have decided that it is faster and cheaper to let the applicants see all our gold invoices over the relevant period. They are in an Eastlight Folder marked: "Gold Invoices – 15 December 2003 to 13 December 2006".

[34] I make further orders that Carl Yung is to provide a further supplementary affidavit within 7 days or such further time as the court allows in keeping with the agreements referred to in [33].

Costs

[35] My initial view is that there should be costs on a 2B basis in favour of Carl Yung as it is the substantially successful party. If however counsel are unable to agree that is the correct approach then brief memoranda are to be filed and served within 7 days. I will allocate a telephone conference if I consider it necessary or if requested by either side.

Telephone Conference

[36] The Registrar is requested to allocate a further telephone conference with a view to discussing pre-trial directions with counsel. Memorandum are to be filed and served two days in advance.

Associate Judge Sargisson