IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

CIV 2007 412 735

	BETWEEN	BENMARROC ESTATES LIMITED Plaintiff
	AND	MOLYNEUX MANAGEMENT LIMITED Defendant

Hearing: 23 June 2009

Appearances: D R Tobin for Plaintiff
C D McKenzie for Defendant

Judgment: 23 June 2009

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
As to Further and Better Discovery
And on Further and Better Particulars

Background

[1] In this judgment all references to the statement of claim will be to the second amended statement of claim . References to the paragraph numbers are to the paragraphs in that pleading.

[2] The second amended statement of claim in this proceeding refers to two contracts between the parties whereby:

(a) In 2000 the defendant agreed to develop a cherry orchard for the plaintiff on its property near Cromwell.

(b) Some three years later the defendant agreed to manage the orchard.

[3] The plaintiff alleges negligence by the defendant and by reason of the particular terms of the contract specifically pleads gross negligence in at least one regard.

[4] The plaintiff alleges that damage was suffered through the loss of cherry tress and of cherry fruit. It claims the loss of development money and costs of replacement which requires proof of negligence and it seeks loss of production for which I am advised the contract requires proof of gross negligence.

[5] There are two sets of applications before me.

Further and better discovery

[6] There is an application, unopposed by the plaintiff for further and better discovery and although matters have since been dealt with by informal disclosure on the part of the defendant of all such documents as it believes it has at this point, it is appropriate that there be a formal order that the additionally disclosed documents be the subject of a verified list of documents. I therefore direct that the defendant file a verified list of documents listing the documents which are relevant in this proceeding including, but not limited to, the following categories:

> (i) All vehicle records, log books, diaries, fields (sic) notes or the like which relate to staff attendances to either switch on, turn off, or monitor frost fighting and frost fighting equipment during the three seasons in question;
>
> (ii) All temperature records kept or obtained by the Defendant during the three seasons in question;
>
> (iii) The frost protection plan to (sic) referred to in the answers to interrogatories;

Further and better particulars

[7] The second application is an application by the defendant for further and better particulars of the plaintiff's claim.

[8] I adopt as the principles applicable to consideration of an application for further and better particulars the following:

(a) The primary purpose of pleadings is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it.

(b) The statement of claim should state the claim in each case so that the Court has sufficient clarity and detail to understand the issues it has to rule on, and the defendant knows the case which is to be met and is able to prepare for trial.

(c) Specifically required by r 5.26(b) are such particulars "…of time, place, amounts, names of persons, nature and dates of instruments, and other circumstances as may suffice to inform the Court and the party or parties against whom relief is sought of the plaintiff's cause of action".

(d) The pleading must set out the facts or circumstances relied upon as giving rise to each cause of action alleged and the relief claimed as a consequence.

(e) The nature and level of particulars will depend on the facts of the individual case.

(f) The distinction between particulars and interrogatories is important – particulars are matters of pleading, designed to make plain to the opposite party the case to be raised whereas interrogatories are sworn statements of fact, procured by the opposite party to assist that party in proving his or her case.

(g) A request for further particulars can be resisted if the request goes beyond the scope of particulars and probes for evidence.

(h) Questions which a Court can usefully ask itself are:

(i) Has sufficient information been provided to inform the other party of the case they have to meet and to enable them to take steps to respond?

(ii) Is there a real risk that the other party may face a trial by ambush if further particulars are not provided?

(iii) Is the request oppressive or an unreasonable burden upon the party concerned?

(i) In considering whether any party is likely to be taken by surprise, the Court is entitled to have regard to the fact that:

(i) If the particulars sought are within the knowledge or control of the requesting party an order for further particulars may be declined pending the completion of discovery or other matters; and

(ii) Briefs of evidence will be exchanged well in advance of the hearing (see *Petrocorp Exploration Ltd v New Zealand Refining Co Ltd* (1993) 7 PRNZ 53). The Court is also entitled to take into account its ability in cases with substantial evidence to provide for defendants to have extended periods of time to digest and respond to the evidence of the plaintiff.

[9] Against that background I turn to the specific matters sought by the plaintiff through the development of its request for further and better particulars. That started with a notice some considerable time ago and culminated in what I regard as the application before me which is contained in a memorandum dated 16 March 2009.

[10] I will deal first with the defendant's request for clarification as to whether the cause of action it faces is in contract or in tort, or in both. Mr Tobin for the plaintiff has confirmed that his pleading is intended to be in contract alone. The statement of claim reads logically in that way because it refers to limitations on recovery which

can arise only under the contract. In view of Mr Tobin's confirmation that a tort claim is not pursued I do not regard it as necessary for the pleading to be amended. There is only one cause of action pleaded and Mr Tobin formally confirms to the Court that the pleading is in contract.

[11] Within a general head of concern Ms McKenzie referred to the principles upon which further particulars may be ordered and emphasised what she submits is a lack of particularisation in relation to the allegation of gross negligence in particular. She referred to the expectation for details of date, time, personnel involved and other relevant details properly required of a pleading. I find it helpful to refer to the specific examples provided by Ms McKenzie in her memorandum as to deficiencies in the pleading, and I commence with the allegation of gross negligence which is contained in paragraph [20] of the claim. The particulars provided in paragraph [20] read:

> (a) Failure to turn it on in time;
>
> (b) Failure to run the system for the proper time;
>
> (c) Failure to ensure adequate coverage of the trees; and
>
> (d) Failure to either warn that spray coverage for frost fighting purposes was inadequate, or to arrange for system reconfiguration to cover the entire orchard.

[12] Ms McKenzie, as I have indicated, submits that it would be proper for the plaintiff in relation to a pleading such as "a failure to turn the system on in time" to provide particulars of date, time and personnel involved. I am far from convinced in a case such as the present where the management of the orchard was in the control of Ms McKenzie's client that the defendant would be embarrassed by a pleading which says that an aspect of its alleged negligence lay in its (that is the defendant's) failure to turn the system on in time. These are matters peculiarly within the knowledge of the defendant. Some additional discovery has recently been made available which might better inform the plaintiff as to the actual performance of the defendant on the ground. In any event the defendant can from its own knowledge prepare to meet the case as it stands on the pleadings. I give that as an example with regard to the particular at paragraph [20](a) but it applies equally in my judgment to the other

particulars. The paragraph [20] particulars of gross negligence are reasonably particularised as it is.

[13] I also note in a case such as this, where the parties have previously discussed the need for expert evidence and the desirability that the experts confer, that there will be at the time evidence is exchanged formally, if not before, the opportunity for the experts themselves to have viewed all the discovered documentation and to cover matters on the basis of the information that they receive orally from their respective clients.

[14] A second aspect of Ms McKenzie's submissions with regard to paragraph [20] and other paragraphs relates to what she referred to as frost fighting theories which will apparently require a consideration by the experts of matters such as different trigger points. It was Ms McKenzie's submission that the statement of claim did not provide the defendant with a realistic opportunity to understand the plaintiff's case as regards matters such as frost fighting theories. I accept that that may be the case but in my judgment it misses the point that those matters are in the nature of evidence rather than pleading. The facts as I have discussed in relation to paragraph [20] are adequately pleaded. The witnesses, as and when briefs are exchanged, will be able to work through such matters as the theory of correct horticultural or other practice within their evidence as to whether (for example) the defendant turned the system on in time.

[15] The next request for further and better particulars which Ms McKenzie addressed was a request for particularisation of the plaintiff's claim for the quantum of the cost of replacing cherry trees. Ms McKenzie noted that it had changed dramatically from an originally pleaded figure of $775,000.00 to a now pleaded figure of $133,7706.25. The reality is that the pleading of the cost of replacement is particularised and I refer to the six heads of costs which are particularised in paragraph [26].

[16] The way in which Ms McKenzie put it in her written submissions was that:

> The statement of claim should reveal the source of that figure and how that sum is calculated

("that sum" being a reference to the sum of $133,706.25)

[17] As I have said, the way in which the sum is calculated is set out in the amended statement of claim. What the source of the sum is (including the examples which Ms McKenzie gave me of the person or source from whom it derived) is purely a matter of evidence and is not a matter required to be covered by the plaintiff in pleading.

[18] The third specific area of the request for further and better particulars relates to pleadings in paragraph [33] of the claim where there are dollar figures provided for alleged losses in relation to four areas, namely "loss of production" (twice), "replacement of trees" and "wasted expenditure".

[19] Ms McKenzie in her oral submissions on this paragraph focussed on the distinction which exists under the contract between loss which can be recovered for negligence and loss which can be recovered only if gross negligence arises. Ms McKenzie submitted that having regard to that distinction the statement of claim needs to provide better particulars as to the losses caused by each type of negligence. She referred to the distinction which is drawn in paragraph [23] between past production (that is during the three years the management contract ran) and future production (that is for the years 2006/2007 and 2007/2008).

[20] I am not satisfied that this area is a matter for particulars. It appears to me it is primarily a matter of understanding from a legal view point how the loss of production claims arise and how they relate to the contract. The statement of claim gives the defendant a proper understanding of the parts of the claim that arise allegedly from negligence and the parts that arise from gross negligence.

[21] That deals with specific paragraphs as referred to in the defendant's original memorandum and in submissions but there were two areas on which I was satisfied in the course of Ms McKenzie's argument that some further definition or particulars should be provided. The first is a somewhat technical or arguably pedantic point, but as it will clarify the pleadings I am inclined to make a direction in that regard. The second is more substantial.

[22] The first point relates to paragraph [27] which is the pleading for lost future income. Whereas paragraph [21] in relation to past losses alleges that the production has been affected "as a result of such negligence", paragraph [27] does not repeat the words "as a result of such negligence". While it may be implicit in the pleading it is not expressed and I direct that the plaintiff file a statement of further and better particulars clarifying that pleading in paragraph [27].

[23] Secondly, there is a reference in paragraph [21] to the frost damage to the crop and frost damage to the trees. While Mr Tobin submitted that the peculiar knowledge of the defendant as to the management and activities on the orchard in this case should weigh against ordering further particulars on a matter such as this, I am satisfied that it is appropriate that the plaintiff particularise what Ms McKenzie in my view correctly referred to as the symptoms of frost damage. It is appropriate that the defendant and its witnesses know precisely what types of physical damage are relied upon by the plaintiff as constituting the frost damage referred to in paragraph [21]. I direct that such particulars also be provided in a notice of further and better particulars.

Costs

[24] I have indicated to counsel what I consider to be the appropriate costs orders coming out of this hearing and while neither is in a position to consent both accept the general sense of what I am about to order.

[25] I order that the plaintiff have the costs and disbursements of and incidental to its application for further and better discovery on a 2B basis, but with no allowance for the appearance today as this appearance has been primarily related to the particulars issues. Those costs are to be paid in any event.

[26] So far as the further and better particulars application by the defendant is concerned I fix those on a 2B basis but having regard to the fact that the defendant has to a modest extent succeeded in this application, but failed in others, I direct that those costs be costs in the cause.

Amendments to statement of claim

[27] I grant leave to the plaintiff to make three sets of typographical amendments to the second amended statement of claim as it is filed. I direct that the next document not be filed as a third amended statement of claim but be filed as a corrected second amended statement of claim without filing fee. The amendments which I authorise are to paragraph [21] the first line the word "of" shall replace the word "to". In paragraph [25] the word "referred" shall replace the word "returned", and in paragraph [33] the figure $144,640.00 shall replace the figure $142,983.00.

Timetabling

[28] Counsel are to file a memorandum proposing a timetable for disposition of the proceeding including their proposals as to the hearing and its timetabling. I envisage on the facts of this case a setting down date of 70 days before hearing and the defendant having 25 working days for its briefs.

Solicitors
Fletcher & Associates, Alexandra for Plaintiff
Michael E. Parker, Queenstown for Defendant