IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-002149

	BETWEEN	JOHN EDWARD WHITEHEAD, ROSALENE MARIE WHITEHEAD AS TRUSTEES OF THE J & R WHITEHEAD TRUST Plaintiffs
	AND	HONEY NEW ZEALAND (INTERNATIONAL) LIMITED Defendant

Hearing: 28 November 2008

Counsel: R M Dillon for plaintiff
M Pascariu for defendant

Judgment: 31 July 2009 at 5:00pm

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

This judgment was delivered by me on 31 July 2009 at 5:00pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Gaze Burt, PO Box 301 251, North Shore City 0752 for plaintiffs
Minter Ellison Rudd Watts, PO Box 3798, Auckland 1140 for defendant

[1] This case involves a dispute over a contract for sale of honey by the plaintiffs to the defendant. The plaintiffs say that they are owed $610,427.57 for honey supplied. The defendant denies liability on the grounds that the honey supplied did not conform to the parties' agreement. It says that it has cancelled the agreement and counterclaims for recovery of the sum of $1,004,839 already paid to the plaintiffs.

[2] The plaintiffs (trustees of the J & R Whitehead Trust) have applied for an order that the defendant Honey New Zealand (International) Limited pay security for costs on the counterclaim. I will refer to the plaintiffs and the defendant as the Trust and HNZIL respectively.

[3] HNZIL opposes the application on the grounds that the Trust has not shown that there is reason to believe that it will be unable to pay costs if the counterclaim is unsuccessful, and that the Court should not exercise its discretion to order security in any event.

Factual background

[4] The Trust carries on a bee keeping business. HNZIL is an exporter of honey and bee products. In particular it deals in Manuka UMF honey.

[5] UMF stands for unique Manuka factor which is an anti-bacterial factor found in some strains of Manuka honey. The UMF description represents a standard of Manuka honey with particular anti-bacterial properties, and commands a higher market price. UMF is also a trade mark owned by the active Manuka Honey Association. It can only be used under licence issued by the Association and can only be applied to honey with a UMF rating of 10 or higher.

[6] The Trust and HNZIL entered into an agreement in May 2007 under which HNZIL agreed to purchase 73,000 kilograms, (approximately) of Manuka honey from the Trust. HNZIL contends that it was a term of the agreement that the honey

would be compliant with European Union (EU) and UMF standards. The Trust deny this.

[7] The honey was delivered on 15 May 2007. At the time of despatching the consignment, the Trust sent HNZIL electronically a document headed "Statement for the Transfer of Bee Products between Listed Establishments" dated 12 May 2007. This statement was part of the compliance process required under the New Zealand Food Safety Authority's regulations to ensure eligibility of the honey for the EU. It comprises a certificate signed by the first-named plaintiff, Mr J Whitehead that the honey supplied had always been processed, stored or handled within EU-listed bee products premises, and was eligible for entry into the EU.

[8] The agreement provided for payment of the purchase price by instalments. HNZIL paid the plaintiffs $1,004,839, but then withheld further payments (from October 2008 onwards) after the plaintiffs advised it that the honey might not be eligible for the EU.

[9] HNZIL had the honey tested and discovered that it had no detectable UMF content. On 31 January 2008 the Trust advised HNZIL that the statement provided was incorrect, and requested that it be destroyed and replaced with an amended statement omitting EU certification. As a consequence HNZIL was left with honey that it could not export to its EU markets, and which it could not sell within New Zealand (due to the quantities involved).

[10] The Trust applied for summary judgment against HNZIL for the unpaid balance of the purchase price ($610,427.57). HNZIL opposed that application and filed a statement of defence and counterclaim alleging breach of contract and of the Fair Trading Act 1986. Amongst other relief, it sought recovery of the money it had already paid the Trust.

[11] The Trust subsequently withdraw the summary judgment application, filed a statement of defence to HNZIL's counterclaim, and brought the present application for security for costs.

Applicable principles

[12] The Court's power to order security for costs is found within r 5.45 (previously r 60) of the High Court Rules. The relevant parts of the rule read:

> **5.45 Order for security of costs**
>
> (1) Subclause (2) applies if a Judge is satisfied, on the application of a defendant,—
>
> ….
>
> (b) that there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding.
>
> (2) A Judge may, if the Judge thinks it is just in all the circumstances, order the giving of security for costs.
>
> ….
>
> (6) References in this rule to a plaintiff and defendant are references to the person (however described on the record) who, because of a document filed in the proceeding (for example, a counterclaim), is in the position of plaintiff or defendant.

[13] Under this rule the party seeking the order (in this case the Trust as counterclaim defendant) must satisfy the Court that the [counterclaim] plaintiff will be unable to meet its costs if unsuccessful. Once satisfied of this, the Court has a discretion, to be exercised in the circumstances of the case, whether to award security and as to the quantum of any award: *A S Mclachlan v MEL Network Limited* (2002) 16 PRNZ 747 at paras [13] and [14].

Preliminary issue

[14] The first plaintiff, Mr J Whitehead, has sworn an affidavit in support of the Trust's application. HNZIL has taken issue with the admissibility of six paragraphs in that affidavit, and the exhibits produced in the course of those paragraphs.

[15] In this evidence Mr Whitehead refers to information given to him by colleagues in the bee keeping industry as to their experiences in obtaining payments from HNZIL. He refers to comments made by four bee keepers as to delays in

payment, leading to three of them retaking possession of their honey. He attached open letters written by each of these persons describing their experiences. Mr Whitehead then refers to discussions with other bee keepers in the Waikato area (the other four were all in Northland) in which similar comments were allegedly made. He also attached excerpts from draft minutes of the Waikato branch of the National Bee Keepers Association recording discussion on these repayment concerns in a meeting in August 2008.

[16] Counsel for HNZIL objected to the admissibility of this evidence. He submitted that the plaintiffs cannot offer unsworn hearsay statements as evidence to support their belief that HNZIL may be unable to meet costs. He said that the evidence is inadmissible in terms of s 17 of the Evidence Act 2006 and that the affidavit does not comply with r 510 (now r 9.76) of the High Court Rules. He also submitted that the evidence did not meet the criteria for admission as published documents or public documents set out in ss 129 and 138 of the Evidence Act. He argued that the discretion to accept hearsay evidence (formerly r 249, now r 7.30) cannot apply as there is no evidence before the Court to indicate that the costs, delay and inconvenience involved in obtaining affidavits from these witnesses would be out of proportion in the circumstances of the case.

[17] In the alternative, counsel submitted that the evidence did not assist the Trust in any event as HNZIL's director and shareholder, Mr R Pringle, had explained the reasons for the non-payment, which were wholly unrelated to HNZIL's financial circumstances.

[18] Counsel for the Trust submitted, to the contrary, that the evidence was admissible as evidence of the inquiries Mr Whitehead had made and hence as a basis for his belief that HNZIL could not pay its debts. He acknowledged that the evidence was hearsay, but submitted that it was admissible pursuant to s 18 of the Evidence Act in that the circumstances in which the statement was made provide reasonable assurance that it is reliable, and that undue expense or delay would be caused if the makers of the statement were required to give the evidence themselves. He added that the exhibited letters were intended to be public documents, and that although the draft minutes were private documents, they were credible on their face.

[19] Counsel for the Trust also submitted that the evidence was admissible under s 20 of the Evidence Act in that r 249 (now r 7.30) specifically authorises the provision of hearsay statements of belief in affidavits if grounds for the belief are given and it is in the interests of justice to do so. He relied on r 510 (now r 5.76) which he submitted allowed affidavits to contain evidence that would be admissible if given at trial by the deponent.

[20] There is no question that the evidence is hearsay (it falls within the definition of s 4 of the Evidence Act). S 18 of the Evidence Act provides that hearsay evidence is admissible where the circumstances relating to the statement provide reasonable assurance that the statement is reliable, and the Court considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.

[21] I am satisfied that the letters at least were made in circumstances that provide reasonable assurance of their reliability. I am not persuaded to the same extent as to the reliability of the draft minutes. However, I do not accept that undue expense or delay would have resulted if the writers of the letters, (or the makers of the statements recorded in the draft minutes) had been required to submit their evidence in affidavit form.

[22] Further, even if it is arguable that undue expense or delay would have resulted (and this particularly applies to the discussion recorded in the draft minutes) the value of the documents is uncertain at best. They have been produced to support Mr Whitehead's expressed belief that HNZIL has insufficient money to pay its debts as they fall due. Mr Whitehead says that he based his belief on his personal experience over the past two years of HNZIL being a "slow payer" and the fact that he "always had to chase them up for payments". The disputed evidence is proffered as further support for his belief. I consider that the evidence is of marginal relevance to the issue before the Court (HNZIL's ability to pay). I will expand on this when considering the admissible evidence.

[23] I also reject the Trust's argument that the annexures constitute public documents. They clearly do not fall within the definition of public document under s 4 of the Evidence Act. Further, the Trust cannot rely on s 20 of the Evidence Act.

Although r 7.30 permits statements of belief in an affidavit if grounds for belief are given, the party tendering that evidence must show that the interests of no other party can be affected by the application, or that the application concerns a routine matter, or that it is in the interests of justice to admit that evidence. I accept the submission of counsel for HNZIL that this rule does not provide the Court with a discretion to accept inadmissible evidence (here the letters and draft minutes) as grounds for the belief in HNZIL's inability to pay.

[24] For these reasons I find that paragraphs 4 to 9 and exhibits A to E of Mr Whitehead's affidavit of 8 October 2008 are inadmissible and cannot be relied on in support of this application.

Is there reason to believe HNZIL will be unable to pay costs?

[25] The Trust bases its application on Mr Whitehead's evidence that HNZIL has been a slow payer, and the inadequacy of a document produced by Mr Pringle which he refers to as "a brief outline of its current assets and liabilities provided by HNZIL's accountant". Although that statement records equity of $7,520,185, it is undated (and hence does not comply with accepted accounting standards). There is no indication as to the date of debts (particularly current liabilities of $2,046,887). The statement shows current assets at $9,844,856, of which Mr Pringle says that $3,253.958.98 comprises stock (honey). There is no explanation as to the nature of the balance of current assets totalling $6,590,897. Counsel submitted that this statement of position tells the Court nothing in relation to a company which has been in existence for only two years, whose sole business is trading honey and bee products, and in respect of which it is said to have assets that are more than double the value of its stock.

[26] In opposition, counsel for HNZIL submitted that the Trust had failed to establish HNZIL's inability to pay. He referred to Mr Pringle's evidence that HNZIL was a successful trading company that was one of the largest bee product producers in New Zealand, and that it had honey in stock worth $3,253,958 as at 3 November 2008 (the day before Mr Pringle swore his affidavit) and net equity of

$7,520,185 as at that same date. He submitted that the only "evidence" put forward by the Trust went nowhere near rebutting HNZIL's evidence.

[27] It is for the Trust to persuade the Court that there is reason to believe that HNZIL will be unable to pay costs on its counterclaim. I have already commented on the only evidence put forward by the Trust (delay in payment). Any inference to be taken from that evidence has been answered by Mr Pringle who refers to disputes, particularly as to UMF content of honey. Although there is some merit to the criticism of the "brief outline" of HNZIL's financial position I have no particular reason to doubt its authenticity. I also note that the onus in respect of the threshold test lies with the Trust. I accept Mr Pringle's direct evidence that HNZIL has stock worth $3,253.958.98. It is also significant that it was in a position to pay the Trust $1,04,839 before the dispute arose.

[28] I find that the Trust has not met the threshold test. I am not satisfied that there is reason to believe that HNZIL will be unable to pay costs if it fails to succeed on its counterclaim.

Discretion

[29] Although I do not need to consider whether I should exercise my discretion to award security, and if so in what amount (because the Trust has not met the threshold test), I will address this point briefly.

[30] Counsel for the Trust submitted that the counterclaim raises matters that are not already at issue in its claim, namely its alleged breach of contract based on an implied term (and discretionary relief being sought in respect of that), and an alleged breach of the Fair Trading Act (which potentially requires consideration of the tort measure of damages). He submitted that these further causes of action and the different assessment of damages will significantly increase the length and accordingly the cost of the proceeding.

[31] Counsel for HNZIL submitted that the Court should decline to exercise its jurisdiction on the grounds that the merits are strongly with HNZIL. He also

submitted that all of the issues raised in the counterclaim would have to be traversed in the course of the Trust's claim. In that respect he submitted that the essence of the Trust's case is that it was not a term of the agreement for supply that the honey met EU standards, and as such both claim and counterclaim would hinge on a finding on that point. For that reason, he submitted that the Trust would not be put to significantly greater cost in defending the counterclaim than would be incurred in prosecuting its own claim.

[32] At this stage of the proceeding I consider that the merits on the counterclaim appear to be in favour of HNZIL. I add however, that that is a matter that can only be fully appreciated when all the evidence is available as to the negotiations leading up to the conclusion of the agreement for supply on 8 May 2007. It stands to reason, however, that it would have been important for HNZIL to have required honey to meet EU standards. I cannot determine whether a term to this effect was agreed upon or whether HNZIL made its position known sufficiently clearly to the Trust to have it imported as a term of the agreement on this application. However, the statement provided by the Trust at the time of consignment of the honey, and the certificate built into it, suggest that the Trust was aware of this need.

[33] A further factor in the discretion is that I consider that both the claim and the counterclaim are likely to depend on the same issue, namely whether it was a term of the agreement that the honey was to be eligible by EU standards. As such, I do not consider that the Trust will be put to significantly greater cost in defending the counterclaim than it would have incurred in prosecuting its own claim.

[34] For both of these reasons, I do not consider it in the interests of justice to exercise the Court's discretion to order security for costs.

Decision

[35] For the reasons set out in this judgment I find that the Trust has failed to establish that HNZIL will be unable to pay costs if its counterclaim does not succeed. I further find that it would not be in the interests of justice to exercise the Court's discretion and order the giving of security in any event.

[36] The application is dismissed. As the successful party, HNZIL is entitled to costs. The Trust is to pay HNZIL its costs of and incidental to this application on a 2B basis together with disbursements as fixed by the Registrar.

_____

Associate Judge Abbott