IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-005548

UNDER	S24c(4) of the Judicature Act 1908
BETWEEN	NEW ZEALAND SPORTS MERCHANDISING LIMITED Plaintiff
AND	DSL LOGISTICS LIMITED Defendant

Hearing: 16 October 2009

Appearances: M Heard for the Plaintiff
M J Fisher for the Defendant

Judgment: 16 October 2009

ORAL JUDGMENT OF PRIESTLEY J

Counsel/Solicitors:
M Heard, Lee Salmon Long, P O Box 2026, Shortland Street, Auckland 1140
Email: michael.heard@lsl.co.nz
J Long, Lee Salmon Long, P O Box 2026, Shortland Street, Auckland 1140
Email: julian.long@lsl.co.nz
M J Fisher, P O Box 3236, P O Box 3236, Shortland Street, Auckland 1140
Email: mj.fisher@erskinechambers.co.nz
P H Castle, Castle Brown, P O Box 9670, Newmarket, Auckland 1149.
Email: p.castle@castlebrown.co.nz

The Issue

[1] The parties executed a contract on 27 December 2004. That contract has now been terminated. The termination process took some time to conclude and was not free from dispute. It is common ground that the contract is now at an end.

[2] The relevant contract contains the following clause which applies to the parties' respective obligations to pay charges and re-deliver the goods on termination. The interpretation of the clause has resulted in this proceeding:

> 7.5(a) Upon termination of the Agreement or part thereof for any reason, Goods shall be re-delivered to THE CUSTOMER or its agents after full payment of all charges has been made, including any charges incurred to return the Goods to THE CUSTOMER.

[3] I shall say more about other relevant provisions of the contract later.

Background

[4] The plaintiff, as its name suggests, is a merchandiser and sells a wide variety of sports related goods, both apparel and non-apparel, on a wholesale basis.

[5] The defendant, for its part, operates a warehousing and dispatch service. The contract calls the defendant's warehouse premises a "logistics centre".

[6] The defendant's business is focused on receiving, storing, picking and packing, and dispatching the stock of its various clients. The attraction of the defendant's service is that wholesalers and merchandisers, such as the plaintiff, can secure appropriate storage for their products. They can also arrange for the packing and dispatch of their products when orders are received without having to incur the cost of providing their own storage

facilities or to employ the staff which would otherwise be necessary for this phase of wholesaling/retailing operations.

[7] The contract was negotiated during the weeks prior to its execution. It is clear from the evidence that the plaintiff's sole director and shareholder, Ms M J Walls, gave some thought to the terms of the contract. Certain modifications were made to it at Ms Walls' request. Little, however, hangs on that.

The contract

[8] The contract (clause 1.3(d)) makes it very clear that the goods which are being warehoused by the defendant pending dispatch remain the sole property of the customer (in this case the plaintiff).

[9] There are a number of services, on the evidence, which the defendant contractually provides. I need not itemise these exhaustively. But they include such matters as locating and clearing through Customs (on occasions) incoming products of the defendant's customers; transporting and storing the goods; invoicing; security; inventory reporting; and keeping track of the relevant product. Clauses 1.1 and 1.2 of the contract specify some of the services the defendant agrees to perform.

[10] Also, as is clear from my brief summary, it is the defendant's responsibility, on receiving appropriate instructions from the plaintiff, to locate, pack and dispatch product which the plaintiff has sold which the plaintiff wants to deliver to its ultimate purchaser.

[11] The contract relevantly provides as follows:

1.3 **Storage and Title**

(a) The following charges are incorporated into the agreed cost per unit in Appendix B:

(i) DSL reports:

(ii) Storage;

(iii) Pick and Pack;

(b) The storage is in non temperature or humidity controlled facilities, unless specifically agreed with DSL.

(c) DSL agrees to provide the following specific facilities in respect of storage of THE CUSTOMER'S Goods:

(i) **security:** a monitored alarm security system operating within the warehouse;

(ii) **storage:** sufficient racking to provide clear storage of THE CUSTOMER'S Goods;

(iii) **systems:** inventory control system including barcode scanning facilities;

...

1.4 **Pick and pack and delivery of Goods**

(a) DSL will pick and pack THE CUSTOMER'S Goods as follows:

(i) DSL will receive orders from THE CUSTOMER or its agents at regular intervals.

(ii) DSL will pick and pack the Goods, and make a record of the picking details from the physical picking of the Goods.

(iii) DSL will then generate a packing list and waybill label in respect of those Goods for delivery to THE CUSTOMER's customer.

(iv) DSL will scan each individual stock keeping unit in all outbound shipments.

(v) DSL will despatch Goods to THE CUSTOMER's customer in accordance with Appendix C.

(b) No Goods will be removed from the Logistics Centre without prior authorisation from THE CUSTOMER or THE CUSTOMER'S duly authorised agent. THE CUSTOMER shall provide to DSL written notice of the names, addresses and telephone numbers of the persons who have such authority.

…

> 3.1 The prices for storage, Pick-and-Pack and Distribution Services are listed in Appendix B. The prices of Transport and Customs Clearance Services are listed in Appendix A. Prices for other Services not specified herein shall be agreed separately.

[12] These clauses are, in my judgment, critical and are free from ambiguity. In their terms, unfortunately, lies the dispute which has divided the parties. Clause 1.3(a), in a global way, makes it clear that the defendant's reports, storage, and "Pick and Pack" *are incorporated into* the agreed unit cost in Appendix B.

[13] In similar fashion, clause 3.1 specifies that the prices for certain aspects of the defendant's contractual obligations, being storage, pick and pack, and distribution services, are similarly listed in Appendix B.

[14] When Appendix B, however, is scrutinised, the following features are evident:

a) The Appendix is headed (in bold letters), "Pick-And-Pack And Distribution Charges".

b) The Appendix then goes on to provide four categories of product, all of which are specific to the plaintiff's goods.

c) There follows a four line table divided and headed into two columns: "Service type" and "Cost". That table specifies a unit cost for each of the four categories.

d) The Appendix then goes on to provide for extra charges to be made in respect of certain types of materials used in a product's packaging. Those items are not relevant here.

The Dispute

[15] Once the contract had been terminated, the parties' positions polarised. The defendant's position is that the contract having been

terminated, the correct construction of clause 7.5(a) is that the plaintiff's goods will be returned to it after the relevant charges for all stored items, calculated in terms of Appendix B, have been paid. Additionally (although this is not a contentious issue), the defendant intends to charge for any additional costs related to returning the goods which, as I understand it, would be limited to the man hours involved with locating goods and relevant pallets and returning them to the plaintiff.

[16] The plaintiff's position, in contrast, is that clause 7.5(a) cannot possibly have this interpretation. In round figures the value of the plaintiff's goods currently stored are in excess of $600,000. If there was to be an application of the charges specified in Appendix B, the charge claimed by the defendant would exceed some $200,000, or approximately one-third of the face value of the goods. In the plaintiff's submission, the contract makes no specific provision for any charge for storage in a situation where the product is not being picked and packed but is instead being returned to the owner on termination. Thus, says the plaintiff, any charges would be for "other services" as provided for in clause 3.1.

[17] Behind these competing positions lie two commercial considerations. The plaintiff's perception is that Appendix B headed as it is "pick and pack and distribution charges", can only relate to work of that description which the defendant actually performs. In a termination situation, these services are not being performed. Thus the charges specified in clause 7.5(a) cannot possibly include the pick and pack, Appendix B per unit items.

[18] The defendant's perception is that it is providing a large range of services to its customers and the plaintiff; that those services extend to such matters as collection, receipt, storage, and inventory, all of which precede any ultimate dispatch of items to the plaintiff's customers; and that the contract bundles up these various services into one unit price. Of particular relevance to the defendant's case is the fact that it is obliged to store the plaintiff's goods for indefinite periods of time.

[19] These competing views all highlighted in counsel's submissions. Mr Heard, for his part, described the "core service" provided by the defendant under the agreement as being the shipment of goods direct to customers. Mr Fisher, for his part, regarded the "core service" as being storage of customers' goods.

Discussion

[20] I have been assisted by the able submissions of both counsel. The submissions, however, do not in themselves provide me with an easy answer to the interpretation problem with which I am confronted. In broad terms, Mr Heard submits that clause 7.5(a) does not apply in this termination situation and that any charges which the defendant may incur as a result of termination are captured by the words " … other services not specified herein" in clause 3.1 (supra), which such charges are to be agreed separately.

[21] Mr Heard pointed to various parts of the contract. He submitted that Appendix B clearly does not apply to every charge which the defendant is contractually entitled to make. There are other charges. He emphasised the heading of Appendix B. He referred me to previous e-mail exchanges between the parties in 2005 and in February 2009 where, for various reasons, in respect of stock which was being returned to the plaintiff (in one case damaged stock), the defendant levied a much lower charge than its interpretation of the contract would have been entitled it to do. That is true, although, for what it is worth, I note that in those instances the defendant's starting point was to rely on the per unit Appendix B calculations.

[22] Mr Heard submitted strongly that the absence of a specific charge for storage in the contract does not justify the conclusion that the defendant had failed to build in a storage component to its various costings at other stages. The risk of this situation on termination, in counsel's submission, should be borne solely by the defendant. This was the structure of the defendant's contract. It ran contrary to the clear terms of the contract to allow the

defendant to apply Appendix B charges here, particularly in a situation where pick and packing and dispatch did not apply.

[23] Mr Heard also drew my attention to clause 1.4(a) (supra). In his submission, none of those specified contractual obligations were performed by the defendant in the discharge of its termination obligation to return the plaintiff's goods to it. The termination clause, Mr Heard submitted, only came into operation when the contract was at an end. For this reason clause 1.4 and the pick, pack, and delivery obligations were not obligations which bound the defendant any longer.

[24] Mr Heard also submitted that the purpose of clause 7.5(a) was not designed to define what a charge was. Rather, it was designed to spell out the respective obligations of the parties on termination.

[25] Mr Fisher's submissions were to the effect that the contract was unambiguous. He referred me to affidavit evidence of Mr Widdows to the effect that the defendant's "pricing and charging model" was to bundle all the various services together without differentiation for charging purposes. The same affidavit also suggests there are other pricing charging models available in the industry which unbundle the separate services and components. Different models were offered to the plaintiff in February 2009 but, unsurprisingly, were not taken up given at that stage that the plaintiff had signalled its desire to end its commercial relationship with the defendant.

[26] I consider there is some force in Mr Heard's submission that I should treat this evidence of Mr Widdows circumspectly inasmuch as it might be designed to explain, impermissibly, what the defendant's intention was at the time the parties entered into the contract. The only value I place on Mr Widdows' evidence is that the contract, when looked at as a whole, certainly seems to be consistent with the model to which Mr Widdows refers.

[27] In similar vein, I place very little weight on the evidence of Ms Walls saying she has never before come across a termination charge of the type the

defendant seeks in her dealings with other “logistics providers” and that it is the industry practice that logistics providers “get paid for pick and packing, not when goods move out of a store in bulk”. His evidence does not assist me in interpreting the contract.

[28] The stark reality is that two commercial parties have entered into a contract. Analogous contracts and industry practice should only be called into aid if a contract is clearly ambiguous.

[29] There was some suggestion by Mr Heard that, as an interpretative exercise, I should apply the *contra proferentum* rule. I can understand why Mr Heard advances that submission. However, given the evidence about the parties’ past dealings with each other and also the evidence that Ms Walls herself sought a very minor alteration to clause 7.5(a) (the addition of words “or its agents”), I decline to apply the *contra proferentum* rule to assist or impede either party in this particular exercise.

[30] Mr Fisher’s submissions addressed the interpretation of clause 7.5(a). There was force to them. He observed that the clause on termination contained two discrete provisions. The first was a requirement for payment of all charges. The second was the amplification of that obligation by the additional words “including any charges incurred to return the goods ....” Those words, counsel submitted, made it clear that the agreed charge payable on termination was not limited to charges incurred in returning the plaintiff’s goods.

[31] Secondly, Mr Fisher correctly observed that clause 7.5(a) was totally silent as to what charges were payable on termination. Thus, as a matter of construction, the answer had to be found elsewhere in the contract which inevitably led to clauses 1.3(a), the first sentence of clause 3.1 and Appendix B.

[32] Finally, Mr Fisher submitted that the clauses defining charges were unambiguous. The structure of the contract was such that the defendant was

not entitled to payment for any charges until goods had been picked, packed, and dispatched from the warehouse.

Decision

[33] With the advantage of hindsight, the contract into which the parties entered over four years ago, is unfortunately drafted. It does not specify precisely what the position is so far as charging is concerned, (particularly charging for the defendant's pre-termination services in respect of goods which have not been sold and dispatched), on termination. Had the parties entered into a contract of a different type, or with greater specificity in the termination area, then trite though it is to observe, this litigation would not have taken place. That said, the relevant contractual terms are clear.

[34] What is it that the plaintiff has to pay on termination under clause 7.5(a) to the defendant to ensure its goods are returned to it? The clause specifies is that it must make "full payment of all charges".

[35] I turn to what these charges might be. The interpretative exercise unhesitatingly must come back to both clause 1.3(a) and 3.1 (supra). The first of these clauses states, clearly and unambiguously, that charges for storage, the defendant's reports, and pick and pack are those agreed at a cost per unit basis in Appendix B. Similarly, clause 3.1 provides that the prices for storage, pick and pack and distribution are those listed in Appendix B.

[36] Are there any storage charges or charges for other individual contractual services performed by the defendant set out anywhere else in the contract? No, there are not.

[37] I turn to what can be the plaintiff's only strong point to counter the clear meaning of clauses 1.3(a) and 3.1. That is the formatting and scope of Appendix B itself. As I have already observed (supra [14]), the heading suggests that the Appendix B per unit costs (spread across four categories)

might be limited to pick and pack and distribution charges. Were that argument to be correct, then it would follow that there would be no contractual recompense for the defendants, and indeed no contractual entitlement, to charge anything for its storage, its reporting and its various other contractual services.

[38] That, however, is not the way the body of the contract is expressed. I do not consider the contract can properly be interpreted to read down clauses 1.3(a) and 3.1 so that the per unit charges in Appendix B are limited solely to those contractual services which the defendant provides at the very end of its contracted services, namely to pick and pack and distribute.

[39] Mr Heard, in his reply, argued against this conclusion. He said that the contract, if so interpreted, would be such a favourable model for the defendant and other providers in the industry that they could execute a contract; terminate the contract after two or three months on some pretext; and charge the Appendix B figures, thus getting a windfall when the cost of storage and other obligations had been minuscule.

[40] The counter-argument seems to me to be that same interpretation would entitle a customer in the plaintiff's position, with no declared intention to use the defendant's services long-term, to enter into a contract; use hardly any of the pick and pack and distribution services; and then on some pretext cancel the contract and pay to the defendant nothing but the costs of returning the goods to it. That, resulting in short term storage for little or no cost would equally, in my view, be a windfall.

[41] Those extreme contrary positions as I have stated them point to the difficulties of this contract in the termination phase. Insufficient thought, in my view, was given to the inter-relationship between the clear and unambiguous provisions of clauses 1.3(a) and 3.1, on the one part, and what precisely is to happen in the termination, on the other part.

[42] But returning to the central issue which I have been required by the pleadings to determine, I have no doubt that clause 7.5(a), when it uses the expression "full payment of all charges" can only refer to those charges stipulated in Appendix B.

[43] I appreciate that the plaintiff will regard this interpretation as being somewhat unfair and may ask itself, with some justification, why should it be that the defendant is entitled to levy charges, which are mainly designed for pick and packing and distribution, in a situation where all that the plaintiff wants to do is to reclaim possession of its own property on termination? I accept the force of that observation from a fairness point of view. But the terms of the contract, being a commercial contract, as negotiated by the parties four years ago, lead me to no other result.

Result

[44] The relief which the plaintiff seeks in the statement of claim, it being common ground that this is what I am required to do, is in terms of s 24C of the Judicature Act 1908, to make a determination on the proper construction of clause 7.5(a) of the parties' agreement. My determination is, in terms of that statement of claim, that:

> The prices for storage, pick and pack, and distribution services which are listed in Appendix B of the agreement for all of the goods that remain within the logistics centre

is in this case the defendant's entitlement under the agreement, and is the sum the plaintiff is required to pay in full prior to the delivery of its goods.

[45] The same statement of claim seeks another determination. I am satisfied, however, from what the parties have told me, that issue is now moot. I note Mr Fisher's undertaking given on behalf of the defendant that the stock-take has now been performed and that no extra charge will be made

for it. Mr Fisher has advised me, on taking instructions, that the only extra cost which would be incurred is a $10 per pallet cost in respect of placing or moving the plaintiff's goods on a pallet. I thus decline to make any determination in respect of (b) of the plaintiff's prayer for relief but reserve leave in what I hope is the unlikely event that there is some unforeseen dispute on that aspect.

Costs category

[46] Mr Heard informs me that there is correspondence which may be relevant to costs. The starting point, of course, would have to be that the defendant is entitled to costs. Both counsel responsibly advise me that the 2B scale would be acceptable. But costs are in any event reserved.

…………………………………………

Priestley J