

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

CIV-2007-404-002545

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: 2 September 2009

Appearances: R O Parmenter for Plaintiff
M J Fisher for First, Second, Fourth and Fifth Defendants
C Sparling for Third Defendant

Judgment: 11 December 2009 at 5:00 pm

RESERVED JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 11 December 2009 at 5:00 pm
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar
Date.....

[1] Carl Yung Gems has sued Leading Design for unpaid invoices for the supply of jewellery. Leading Design has counterclaimed, alleging that Carl Yung Gems breached the terms of their agreement in relation to the price and weight of jewellery supplied. Leading Design applied for particular discovery of a category of documents described as “New Zealand Customs importation and clearance documentation”. Sargisson AJ declined the application and Leading Design seeks a review of that decision, asserting that the Associate Judge took too narrow a view of what constituted “New Zealand Customs importation and clearance documentation”.

[2] Before I turn to the substantive issues on this application I need to deal with an aspect of the evidence that was adduced in support of it. The application was heard in October 2008 and affidavit evidence was filed by both parties beforehand. After the hearing Carl Yung Gems filed a supplementary affidavit by Priscilla Yung, the financial controller of Carl Yung Gems, but did not file an application for leave to file it and have it read. Leading Design assumed that the Associate Judge would not take the supplementary affidavit into account and took no steps in relation to it. However, the Associate Judge did take the affidavit into account and referred to it in her judgment. Leading Design asserts that this was an error. As part of its application for review it sought to file an affidavit by its director, Mr Cameron, in reply to Ms Yung’s supplementary affidavit.

[3] When the application for review came before the Court for mention Ronald Young J refused leave to file the affidavit on the basis that the application to review was based in part on the Associate Judge taking the supplementary affidavit into account. At the hearing before me, however, Mr Parmenter, for Carl Yung Gems, consented to the filing and reading of Mr Cameron’s affidavit in reply to the late-filed supplementary affidavit provided that Ms Yung’s affidavit was also read. It is clear that both affidavits deal with an important aspect of the case and, as the parties consent to both affidavits being read, I grant leave in respect of both.

The substantive proceeding

[4] During 2003 Carl Yung Gems began supplying precious and semi-precious gems to Leading Design. The parties differ as to the precise contractual arrangements. It is, however, common ground that by late 2003 Leading Design

had fallen behind in payments owed for gems that Carl Yung Gems had supplied. At that stage they entered into a different arrangement. Carl Yung Gems characterises it as a variation of the terms of an existing supply agreement in consideration for its forbearance to sue for the outstanding amount. Leading Design characterises it as an exclusive manufacturing and supply agreement in the nature of a joint venture. For present purposes it is the allegations made by Leading Design that I focus on, since the issue of relevance for the purposes of discovery will be determined by those allegations.

[5] Leading Design had orders from retail customers that it had to fulfil. It alleges that the agreement with Carl Yung Gems included the following terms:

- a) Carl Yung Gems would manufacture in China and deliver to Leading Design in Auckland all jewellery, diamonds and coloured stones required by Leading Design to fulfil its orders.
- b) The price Carl Yung Gems would charge would not exceed 80% of the price Leading Design's retail customer had agreed to pay so that at all times Leading Design's profit margin would be 20%.
- c) Leading Design would pay Carl Yung Gems half of its 20% margin by way of debt repayment instalments.
- d) Carl Yung Gems would manufacture and deliver diamonds and gemstones at prices specified in price lists and give reasonable notice of changes.
- e) Carl Yung Gems would manufacture and deliver 9-carat gold jewellery based on a price of NZ\$12 per gram and give reasonable notice of any change.

[6] Leading Design says that it placed orders for jewellery with Carl Yung Gems at an agreed weight and price. It alleges various breaches by Carl Yung Gems, including exceeding the agreed price for 9-carat gold jewellery, delivering jewellery at weights below the specified and agreed weight, delivering jewellery at weights above the specified weight and charging accordingly, exceeding agreed prices, and

charging for jewellery based on the average weight of product rather than the agreed price.

The documents sought

[7] The category of documents that was the subject of the Associate Judge's decision was:

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

[8] The focus of the application for particular discovery was on documents that might relate to the weight of Leading Design's confirmed orders for jewellery. Mr Fisher, for Leading Design, submitted that any documents that showed the weight of confirmed orders would tend to show that there was an agreement that jewellery be supplied according to weight and support Leading Design's allegations of under and overcharging if the recorded weight were not the same as the weight Leading Design says was agreed at the time of the order. In particular, such documents would be relevant to:

- a) Whether Carl Yung Gems and Leading Design Jewellery had agreed as to the weight and price in respect of each order (which is what Leading Design Jewellery contends) or whether there was a general agreement to pay Carl Yung Gems' invoiced price on goods ordered (which Carl Yung Gems contends).
- b) Whether the content of documents held by Carl Yung Gems disclosing the weight of products either ordered or imported assist in determining the nature of the agreement between the parties.
- c) If there was agreement as to weight and price at the time orders were placed and confirmed, identifying instances when the invoiced price exceeded the agreed price, determining whether the explanation for differences in price was related to the difference between ordered and actual weight of the goods, the nature and extent of complaints by Leading Design about differences between agreed weights and prices

and invoiced weights and prices and the amount of overcharging by Carl Yung Gems.

[9] In his affidavits Mr Cameron discussed the order confirmations which he believed would demonstrate that price and weight had been agreed at the time of the order being placed. He referred to an occasion on which Ms Yung showed him and another defendant a set of documents relating to a particular order, which included Leading Design's order confirmation together with Customs import documentation and Carl Yung Gem's invoice to Leading Design. Mr Cameron deposed that keeping such documents together was standard and necessary practice in the industry for Customs purposes. He also described folders containing some of the order confirmations placed by Leading Design in which the agreed price had been obliterated, sometimes by being "twinked" out.

[10] Mr Cameron also referred to another occasion on which he had discussed the cost of earrings with Ms Yung and, on asking to see Carl Yung Gems import documentation, was shown an invoice for a recent order delivered from the Chinese factory to Carl Yung Gems which had handwritten weights alongside a depiction of each style or design code. He noticed that the products were all under the specified weights though the price was the agreed price.

[11] The Associate Judge found that the documents being described by Mr Cameron were not "customs documents". Although she did not elaborate on that conclusion it is apparent that she was treating a "customs document" as a document created either specifically by or for the Customs Department. Further, the Associate Judge found that, whilst Carl Yung Gems clearly held Customs documentation of a general kind, she could not be satisfied that such documentation existed in relation to individual orders. This conclusion was, undoubtedly, fortified by the supplementary affidavit filed by Ms Yung.

[12] In her supplementary affidavit Ms Yung explained that goods destined for Leading Design Jewellery came in bulk mixed with other customers' goods and that goods for various orders might come in one parcel or alternatively goods for a single order might be spread over several parcels. As a result, she said that it was

impossible to identify specific Customs documentation relating to a particular order by Leading Design.

[13] In his affidavit filed response, Mr Cameron explained that what he meant by “Customs importation and clearance documentation” was not only documents produced specifically by or for New Zealand Customs but also various documents required by the Customs and Excise Regulations 1996 to be retained by any importer. Mr Fisher submitted that it was apparent from the earlier affidavit evidence filed in support of the application that the class of documents “Customs importation and clearance documents” being sought by Leading Design was broader than documents created by or for the Customs Department and included documents that an importer is required to retain under the Customs and Excise Regulations 1996.

[14] I accept that on the basis of the pleadings and the evidence there is a real issue as to whether Leading Design’s orders specified the weight and price of products. Documents that are relevant to that issue should be discovered. The description “New Zealand Customs importation and clearance documentation” in its strict sense would mean documents created by or for New Zealand Customs; the fact that other documents of a general nature exist which are required by the Customs and Excise Regulations 1996 to be retained would not alter their nature so as to make them “customs documents”. In this sense, the Associate Judge was correct in her conclusion. However, the description was not something to be approached in a strict way. This was an application by Leading Design and it is apparent from Mr Cameron’s evidence that he was using this descriptive phrase as a kind of shorthand, to convey the idea of any documents connected with the importation process. No doubt the application could have been better worded. But the important point is that Carl Yung Gems is obliged to discover all documents that are relevant, having regard to the pleadings.

[15] Under Regulation 59 Customs and Excise Regulations 1996 an importer is required to retain records generated by or otherwise come into its possession or control that are necessary to verify, amongst other things, the importation of any goods and the manufacture of any goods subject to excise duty. Such records can include ordering and purchase documentation such as orders, confirmations of

orders, invoices and correspondence between the importer and any party related to the transaction. If any of these documents contain information such as references to weight and price relevant to the issues in the substantive proceedings, they should have been discovered. The fact that they might not fall within a strict reading of the category for which particular discovery was sought does not relieve Carl Yung Gems of the obligation.

[16] One concern raised on behalf of Carl Yung Gems was the prospect of disclosing documents that contain information about other customers. That does not relieve Carl Yung Gems of the obligation either. The use to which material produced on discovery can be put is limited and I am confident that Leading Design's solicitor will take steps to ensure that the necessary confidentiality is preserved.

[17] I therefore make an order that Carl Yung Gems file and serve a second supplementary list of documents that include but are not limited to any relevant document required to be retained under the Customs and Excise Regulations 1996. For clarity, I repeat that, regardless of how the application was worded, if documents exist that are relevant to the allegations against Carl Yung Gems these are to be discovered.

[18] Costs are reserved.

P Courtney J

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