

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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2018-404-002219
[2019] NZHC 1112**

UNDER the High Court Rules rr 1.19, 5.21 and 5.27

BETWEEN COPY SOLUTIONS EXPORTS LIMITED
Plaintiff/Respondent

AND FUJI/XEROX NEW ZEALAND LIMITED
Defendant/Applicant

Hearing: 15 May 2019

Appearances: P F Chambers for Plaintiff/Respondent
K C Francis and E S D Maiden for Defendant/Applicant

Judgment: 22 May 2019

JUDGMENT OF ASSOCIATE JUDGE P J ANDREW

Introduction

[1] The defendant, Fuji Xerox New Zealand Ltd (FXNZ), provides digital printing technologies and logistical solutions. In particular, it sells or leases photocopiers and other reprographic equipment.

[2] The plaintiff, Copy Solutions Exports Ltd (Copy Solutions), alleges that it entered into an exclusive agreement with FXNZ under which FXNZ was obliged to sell all of its second-hand or end-of-life photocopiers to Copy Solutions, and that FXNZ repudiated this agreement by failing to supply photocopiers as agreed.

[3] The statement of claim contains three causes of action: repudiation of contract, misrepresentation and contractual mistake.

[4] FXNZ makes application pursuant to r 5.21 of the High Court Rules 2016 for orders requiring Copy Solutions to provide further particulars said to be necessary to give FXNZ fair notice of the case against it.

[5] FXNZ has not yet filed a statement of defence and contends that it should not be required to do so until such time as the particulars sought have been provided by Copy Solutions. It seeks an order extending time for the filing of a statement of defence. Copy Solutions contends that its statement of claim has given fair notice of its claims, that the application for extension of time for filing a statement of defence should be dismissed and the matter set down for a formal proof hearing.

Relevant legal principles

[6] Rule 5.21 entitles a party to request further and better particulars by notice where a pleading is considered defective or does not give particulars properly required to give “fair notice” of a claim. Rule 5.21 reads:

5.21 Notice requiring further particulars or more explicit pleading

- (1) A party may, by notice, require any other party –
 - (a) to give any further particulars that may be necessary to give fair notice of –

- (i) the cause of action or ground of defence; or
 - (ii) the particulars required by these rules; or
 - (b) to file and serve a more explicit statement of claim or of defence or counterclaim.
- (2) A notice must indicate as clearly as possible the points on which the pleading is considered defective.
- (3) If the party on whom a notice is served neglects or refuses to comply with the notice within 5 working days after its service, the court may, if it considers that the pleading objected to is defective or does not give particulars properly required by the notice, order a more explicit pleading to be filed and served.
- (4) Even if no notice has been given under this rule, the court may on its own initiative order a more explicit pleading to be filed and served.

[7] Rule 5.26 outlines the requirements for a statement of claim, which “must show the general nature of the plaintiff’s claim to the relief sought” and:

... must give sufficient particulars of time, place, amounts, names of persons, nature and dates of instruments, and other circumstances to inform the court and the party or parties against whom relief is sought of the plaintiff’s cause of action ...

[8] In *Price Waterhouse v Fortex Group Ltd*, the Court of Appeal held that pleadings are intended to ensure the proper pre-definition of issues so as to avoid surprise.¹ Pleadings that are properly drawn and particularised are an essential roadmap for the court and the parties.

[9] In *Platt v Porirua City Council*, Kós J held that particulars of pleading are important to:²

- (a) inform the defendant as to the case they have to meet;
- (b) limit the scope of the matters the plaintiff may put in issue at trial;

¹ *Price Waterhouse v Fortex Group Ltd* CA179/98, 30 November 1998 at [9].

² *Platt v Porirua City Council* [2012] NZHC 2445 at [19].

- (c) enable the defendant to know the witnesses it will need to retain and enable them to start preparing evidence ahead of the formal exchange of evidence; and
- (d) provide an opportunity for the defendant to seek summary determination on the basis that the claim pleaded is untenable.

[10] There are no set rules as to what particulars are required for specific causes of action. However, the Court of Appeal has held that a party must plead “essential particulars”. Those are the particulars relied upon as constituting a cause of action.³

Analysis and decision

[11] I find that FXNZ has established that the statement of claim is inadequate in that it does not give fair notice to FXNZ of the case it has to meet. This is a claim for a substantial sum of money in excess of \$3,000,000 and the issue of the particulars is to be assessed in that context.

[12] I find that Copy Solutions has not provided sufficient particulars of the following matters:

- (a) The formation and terms of the three contracts pleaded;
- (b) The alleged manner of repudiation;
- (c) The methodology for the calculation of the loss claimed;
- (d) The nature and maker of the alleged misrepresentations; and
- (e) The fundamental statutory threshold under ss 24 and 28 of the Contract and Commercial Law Act 2017 (the CCLA) (contractual mistake) entitling the plaintiff to relief.

[13] I address each of the three causes of action in turn.

³ *Reid v New Zealand Trotting Conference* [1984] 1 NZLR 8 (CA) at [14].

The first cause of action — repudiation of contract

[14] Copy Solutions says that it does not have copies of the letters of 2004 and 2009 that it relies upon to establish a contract between the parties. I accept that at this stage it cannot provide the dates of those letters. However, Copy Solutions should identify the “senior members of the defendant”, being those persons said to have committed to a contract on behalf of FXNZ.⁴ It is apparent that Copy Solutions, who has filed an affidavit from Mr Dean Murray (one of the signatories of the letter of May 2014 and a previous employee of FXNZ), likely knows the identity of these “senior members of the defendant”.

[15] If it is alleged that the original offer was made by FXNZ through the letter and Copy Solutions accepted the offer,⁵ then it is important for Copy Solutions to identify the manner of acceptance of the offer (by letter, orally or by conduct).

[16] I accept the submission of FXNZ that, in the absence of a minimum level of supply required by FXNZ, it is difficult to understand how a failure to supply photocopiers to Copy Solutions breached any obligation or could trigger any loss.

[17] I acknowledge that Copy Solutions has alleged an “exclusive arrangement” between the parties and referred to what appears to be a minimum volume obligation (“ensure the availability of machines for purchase from it, greater than the first year of the agreement, and every year of the five-year term thereafter”).⁶ However, in its current form, the statement of claim does not, in my view, make sufficiently clear what are the fundamental terms of the bargain that is said to have been concluded between the parties. The essential terms of FXNZ’s obligations, including whether it could dispose of the equipment in ways other than sale to the plaintiff, needs to be identified.

[18] I acknowledge that at the hearing Mr Chambers helpfully clarified the nature of the obligations owed by the defendant. However, it is important that the pleadings clearly identify what the critical obligations were.

⁴ Statement of Claim (10 October 2018) at [6] and [10].

⁵ The allegation is not entirely clear from the Statement of Claim (10 October 2018).

⁶ Statement of Claim (10 October 2018) at [4.2] and [4.5].

[19] It is also unclear what the words “financial spatial limitations of the plaintiff” mean.⁷ If that means that the obligations of FXNZ were subject only to the financial ability or capacity of Copy Solutions to buy the equipment, then that needs to be both clearly stated and set out in such a way that it can reasonably be understood how, in practice, these contractual arrangements worked.

[20] In my view, Copy Solutions needs to identify the manner in which the contracts of both 2004 and 2009 were formed and how it accepted FXNZ’s offer. If it is claimed that the plaintiff accepted the terms offered by letter,⁸ then it needs to be made clear that the plaintiff responded and accepted by letter the offer contained in the defendant’s 2009 letter. The words – “The plaintiff accepted those terms by letter, and again, signed by two (2) senior members of the defendant” – is not sufficiently clear as to the mode of acceptance by the plaintiff.⁹

[21] I do not accept Mr Chambers’ argument that [20]–[21] of the Statement of Claim provide sufficient particulars of the essential terms of the contracts between the parties. Whether [20]–[21] should in fact be three separate paragraphs is immaterial. Instead of setting out the detail of correspondence between the parties relating to the nature of the dispute (and after the event), the pleadings should contain the primary or essential facts to support the cause of action.

[22] In relation to [24] of the Statement of Claim, I agree with the submission of Mr Francis that Copy Solutions should identify the term of the alleged contract breached by FXNZ.

[23] In relation to the issue of the nature and quantification of the loss claimed,¹⁰ I find that Copy Solutions needs to identify the precise period of time for which it claims lost earnings and how, in the sense of the methodology, the sum of \$3,071,512.50 has been calculated for that period. I accept, as Mr Chambers submitted, that precise calculations based on an expert’s assessment need not be provided at this stage, but it is essential to identify in the pleading the basic methodology for calculating the loss.

⁷ At [4.5].

⁸ At [10].

⁹ At [10].

¹⁰ At [25].

That should include what account has been taken of the costs of goods sold and expenses that Copy Solutions has avoided that would otherwise have been incurred to service the sales that it claims that it has lost.

[24] In relation to the allegation of repudiation of contract, I accept the contention of FXNZ that Copy Solutions needs to specify the following:

- (a) What specific conduct by FXNZ is alleged to amount to a repudiation of the contract (s 36 of the CCLA); and
- (b) The particular contractual terms that the conduct is alleged to be a repudiation of.

Second cause of action — misrepresentation

[25] Copy Solutions alleges that FXNZ made express representations as to supply, quantum of supply, price and duration of supply of FXNZ's machines.¹¹ No other details are provided.

[26] I find that Copy Solutions should, as FXNZ contends, provide particulars as to what express representations were made (accepting that they relate to the general subject matters of supply, quantum of supply and duration of supply). What, for example, was the representation made about price?

[27] I also accept that Copy Solutions should identify when the representations were made, who they were made by and how they were communicated.

Third cause of action — contractual mistakes

[28] Section 24(1) of the CCLA reads:

24 Relief may be granted if mistake by one party is known to another party or is common or mutual

- (1) A court may grant relief under section 28 to a party to a contract if, –
 - (a) in entering into the contract, –

¹¹ At [30].

- (i) the party was influenced in the party's decision to enter into the contract by a mistake that was material to that party, and the existence of the mistake was known to the other party or to 1 or more of the other parties to the contract; or
 - (ii) all parties to the contract were influenced in their respective decisions to enter into the contract by the same mistake; or
 - (iii) the party and at least 1 other party were each influenced in their respective decisions to enter into the contract by a different mistake about the same matter of fact or of law; and
- (b) the mistake or mistakes resulted, at the time of the contract –
- (i) in a substantially unequal exchange of values; or
 - (ii) in a benefit being conferred, or an obligation being imposed or included, that was, in all the circumstances, a benefit or an obligation substantially disproportionate to the consideration for the benefit or obligation; and
- (c) in a case where the contract expressly or by implication provides for the risk of mistakes, the party seeking relief (or the party through or under whom relief is sought) is not obliged by a term of the contract to assume the risk that that party's belief about the matter in question might be mistaken.

[29] Copy Solutions alleges that it entered into a contract in reliance upon written statements made by FXNZ in 2004, 2009 and 2014.¹² It claims that it had no knowledge that it had mistaken the written statements as terms of the contract between it and the defendant until the defendant expressly stated so in September 2018. Copy Solutions then broadly pleads that it is entitled to claim compensation under s 28(2)(d) of the CCLA.

[30] I find that the statement of claim fails to identify which of the limbs in either s 24(1)(a) or s 24(1)(b) are relied upon. The current pleading does not make it clear whether there was a unilateral mistake or a common mistake. Furthermore, as currently pleaded, the statement of claim is not clear as to the knowledge of FXNZ; it refers only to the knowledge of the plaintiff.¹³

¹² At [36]–[42].

¹³ At [40].

[31] For all these reasons, I find that the application by FXNZ to order further particulars should be granted on the terms set out below.

[32] I now turn to address the second main issue, namely FXNZ's application to extend time for the filing of its statement of defence.

Extension of time

[33] A statement of defence must be filed and served within 25 working days after service of a notice of proceeding.¹⁴ If a defendant requires more time, an application for extension of time can be made under rr 1.19 and 5.47.

[34] The Court's discretion to extend deadlines is "unfettered" and applies even if the application for extension of time is not made until after the expiration of time appointed.¹⁵ An extension of time for filing a statement of defence is to be determined on the basis of the overall interests of justice after considering the competing interests of the parties.¹⁶

[35] FXNZ made application for an extension of time on 16 November 2018 and within the time it was required to file its statement of defence.

[36] I find that it is in the interests of justice for the application for an extension of time to be granted. FXNZ had legitimate reasons for making the application and I find that no prejudice will be caused to Copy Solutions by the extension. It is a significant step to prevent a defendant from taking steps to defend a substantial claim against it. In my view, it would be quite wrong in the circumstances here, where FXNZ has raised legitimate concerns about a lack of particulars (directed at whether there was actually a contractual relationship between the parties), to refuse an extension. The appropriate course is to require Copy Solutions to file an amended statement of claim and FXNZ then to file and serve a statement of defence.

¹⁴ High Court Rules 2016, r 5.47.

¹⁵ *Caltex Oil (NZ) Ltd v Hughes* (1986) 1 PRNZ 235 (HC) at 237.

¹⁶ *Dotcom v Attorney-General* [2018] NZHC 653 at [19]. See also *Almon v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [38], which although applies to extensions of time for the filing appeals, helpfully identifies four potentially relevant factors: the length of delay; the reasons for the delay; the conduct of the parties; and any prejudice to the respondent.

Result

[37] I grant FXNZ's application for further particulars and extension of time for filing a statement of defence on the terms set out below.

[38] The plaintiff, Copy Solutions Ltd, is to file and serve an amended statement of claim by 14 June 2019.

[39] The defendant, Fuji Xerox NZ Ltd, is to file and serve a statement of defence by 3 July 2019.

[40] The amended statement of claim by the plaintiff, Copy Solutions, is to provide the following particulars.¹⁷

The alleged initial agreement

[41] In relation to [4] of the Statement of Claim, the plaintiff is to specify:

- (a) What second-hand and end-of-life machines the plaintiff was allegedly engaged to purchase;
- (b) By reference to quantity or gross amount, what is meant by "ensure the availability of machines ... greater than the first year of the agreement";¹⁸ and
- (c) What is meant by "financial spatial limitations of the plaintiff".¹⁹

[42] In relation to [5] of the Statement of Claim, the plaintiff is to specify when the alleged acceptance in letter form was communicated.

¹⁷ This is based in large part on the consolidated table of pleading and further particulars request filed by the defendant at the hearing.

¹⁸ Statement of Claim (10 October 2018) at [4.5].

¹⁹ At [4.5].

The alleged extension to the agreement in 2009

[43] In relation to [9] of the Statement of Claim, the plaintiff is to specify who at the defendant company wrote to the plaintiff on that occasion.

The further alleged extension to the agreement in 2014

[44] In relation to [14] of the Statement of Claim, the plaintiff is to specify the following:

- (a) When it allegedly accepted the further terms of the new agreement; and
- (b) How this alleged acceptance by the plaintiff was communicated.

The alleged breach of the agreement

[45] In relation to [24] of the Statement of Claim, the plaintiff is to specify:

- (a) What term of the alleged contract was breached by the defendant allegedly ending its supply of machines to the plaintiff; and
- (b) When, in late 2016 or early 2017, it is alleged that this term was breached by the defendant ending its supply of machines.

Nature of loss

[46] In relation to [25] of the Statement of Claim, the plaintiff is to specify:

- (a) What is the precise period of time for which the plaintiff claims lost earnings (that is, from what date until 15 May 2019);
- (b) How the sum of \$3,071,512.50 has been calculated for that period (that is, the methodology); and
- (c) What account has been taken of the costs of goods sold and expenses that the plaintiff has avoided that would otherwise have been incurred to service the sales that the plaintiff claims it has lost.

Repudiation of contract

[47] In relation to [27] of the Statement of Claim, the plaintiff is to specify:

- (a) What specific conduct of the defendant is alleged to amount to a repudiation of the contract;
- (b) When the alleged conduct took place; and
- (c) What contractual term(s), if any, this conduct was an alleged repudiation or breach of.

Misrepresentation

[48] In relation to [30] of the Statement of Claim, the plaintiff is to specify:

- (a) What express representations are alleged to have been made to the plaintiff (whether as to supply, quantum of supply, price and duration of supply of the defendant's machines);
- (b) When those representations were made;
- (c) Who those representations were made by;
- (d) To whom those representations were made; and
- (e) How those representations were communicated.

Contractual mistake

[49] In relation to [36]–[42] of the Statement of Claim, the plaintiff is to specify how the mistake(s) resulted at the time of the contract (s 24(1)(b) of the CCLA):

- (a) In a substantially unequal exchange of value; or
- (b) In a benefit being conferred, or an obligation being imposed or included, that was, in all the circumstances, a benefit or an obligation

substantially disproportionate to the consideration for the benefit or obligation.

[50] In relation to [37] of the Statement of Claim, the plaintiff is to specify:

- (a) What written statements are alleged to have been made;
- (b) Who those statements were made by;
- (c) To whom those statements were made; and
- (d) How those statements were communicated.

[51] My preliminary view is that having succeeded, the defendant, Fuji Xerox NZ Ltd, is entitled to costs on a 2B basis. If the parties cannot agree on costs, then memoranda are to be filed within 14 days.

Associate Judge P J Andrew