

CITATION: *BH Fresh Pty Ltd v Xuan Hoi* [2006] NTMC 095

PARTIES: BH FRESH PTY LTD

v

XUAN HOI

TITLE OF COURT: Local Court

JURISDICTION: Local Court

FILE NO(s): 20521448

DELIVERED ON: 8th December 2006

DELIVERED AT: Darwin

HEARING DATE(s): 17.10.06, 10.11.06 and 6.12.06

JUDGMENT OF: Judicial Registrar Fong Lim

CATCHWORDS:

Practice and procedure – summary judgement – Rule 27.01 Local Court Rules
Jones v Stone [1894] AC 122
Clarke v The Union Bank of Australia Ltd (1917) 23 CLR 5.
Fancourt v Mercantile Credits Ltd [1983] 154 CLR 87

REPRESENTATION:

Counsel:

Plaintiff: Asha McLaren
Defendant: TS Lee

Solicitors:

Plaintiff: Asha McLaren
Defendant: TS Lee

Judgment category classification: C
Judgment ID number: [2006] NTMC 095
Number of paragraphs: 46

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20521448

BETWEEN:

BH Fresh Pty Ltd
Plaintiff

AND:

Xuan Hoi
Defendant

REASONS FOR JUDGMENT

(Delivered 8th December 2006)

Judicial Registrar Fong Lim:

1. The Plaintiff makes application for summary judgement pursuant to Rule 27.01 on the basis that the Defendant has no defence to the Plaintiff's claim.
2. The application had a number of false starts as documents filed by both parties were defective in some way. Both parties produced further evidence during the adjournments of this application. The Plaintiff relies on the affidavits of Ba Van Nguyen, a director of the Plaintiff, sworn the 1st of September 2006, 21st November 2006 and 5th December 2006. The Defendant relies on the affidavits of Xuan Hoi do sworn the 26th October 2006 & 5th December 2006.
3. It is agreed between the parties that there was an agreement between the Plaintiff and the Defendant that the Defendant would supply mangoes to the Plaintiff for sale on consignment on the Melbourne market and that the Plaintiff would pay the Defendant for those mangoes for the 2003 and 2004 mango season once mangoes were sold. What is not agreed between the

parties is that the terms of that agreement regarding price in particular and whether that agreement has been breached.

4. In its first affidavit of the 1st September 2006 the Plaintiff does not state what was agreed in relation to the basis of any payment to be made to Defendant for his mangoes. The Plaintiff claims that it made payments in advance to the Defendant by way of paying some transport costs and making lump sum payments to assist the Defendant with the purchase of a mango crop from another farmer however the defendant did not supply to the Plaintiff enough mangoes to cover those advances. The Plaintiff's claim is for those monies to be paid back to it.
5. The Plaintiff's statement of claim is for the sum of \$77270.43. That sum is result of an accounting of the monies paid by the Plaintiff on behalf of the Defendant for transport, boxes and purchase of a mango crop set off against the value of the mangoes supplied by the Defendant.
6. In its second affidavit of the 21st November 2006 the Plaintiff addresses the issue of how the mangoes were to be paid for in paragraphs 5 & 6. In that affidavit Mr Ngyuen states:

“5. It was always agreed by the parties that the defendant would be credited at fair market value for the mangoes supplied to him in consideration for the monies paid to him & for and on his behalf.

6.I say that from 15 September 2004 to 13 September 2004 the Defendant supplied the Plaintiff with 2183 boxes of 10kg each and 51 trays of 7 kg each of mangoes for which the defendant was paid or credited at the prevailing market rate. The defendant is not entitled to be paid at the average market value of the mangoes for all mangoes consigned by him but is to be paid at the prevailing market value.”

7. In two consecutive paragraphs the Plaintiff gives two different bases for the pricing of the mangoes “fair market value” and the “prevailing market value”.

8. The Defendant maintains that he came to an agreement with the Plaintiff to supply mangoes and that while the Plaintiff has made some payments to the Defendant the Defendant does not accept that he has been paid all that is due to him. The Defendant claims that the Plaintiff has not paid him the proper price for the mangoes supplied. It is the Defendant's claim that he was not paid the average market price for the mangoes supplied to the Plaintiff in 2003.
9. In his first affidavit of the 26th October 2006 the Defendant states in paragraph 9 that he was not paid the "correct market price". The Defendant is not clear on what he says was the basis agreed and merely claims at paragraph 10: "If I was to be paid the average market value for the mangoes the total amount would be.....".
10. The Defendant also maintains that in 2004 he came to a separate oral agreement with the Plaintiff regarding the purchase and supply of Nam Doc Mai mangoes from Jaroon Rattarom's orchard. The terms of that agreement will be discussed later.
11. The Plaintiff argues that the Defendant's defence is really in the form of a counterclaim and as such even if it could be proved to be arguable should not be allowed to stand in the way of the Plaintiff's summary judgement.
12. If the Defendant's only defence was a counterclaim I might be minded to accept that argument however the Defendant's defence is so intrinsically linked to the Plaintiff's calculations of its loss that I cannot accept that submission by the Plaintiff. The Defendant has pleaded that he does not owe the Plaintiff money because the Plaintiff's accounting is incorrect for the 2003 season as it does not credit enough value to the Defendant for the mangoes originally sent in 2003. Then the Defendant also claims that he has not been paid for the Nam Doc Mai mangoes sent in 2004 at an agreed price of \$2:50 per kilogram that is the Defendant's counterclaim. The Plaintiff

disputes there was ever an agreement in regarding the 2004 season as submitted by the Defendant.

13. The Plaintiff has supported its claim with documentation evidencing all of the payments made to the Defendant and on the Defendant's behalf. The Defendant does not dispute the payments made however he does say that the amount credited for the mangoes sold was too little.
14. There is no documented evidence of the agreement between the parties as it seems that the agreement or agreements were purely oral.
15. What is clear from the evidence is that over the mango season of 2003 and 2004 the Defendant sent mangoes to the Plaintiff in Melbourne for sale on that market. Mr Ngyuen, in paragraph 3 of his affidavit of the 1st September 2006, claimed that the Plaintiff accounted to the Defendant for all of the mangoes by way of invoice. Those invoices were apparently annexed to Mr Ngyuen's affidavit however a close examination of the documents annexed to the affidavit showed there were only invoices relating to some mangos in the 2004 season and there were no invoices relating to the 2003 season. What is annexed to Mr Ngyuen's affidavit in relation to the 2003 season is a statement referring to invoices numbers not the primary documents themselves.
16. While the lack of production of invoices may seem trivial it is of utmost importance in this matter because one of the complaints the Defendant makes about the Plaintiff's dealings with him is that he has never received any invoices from the Plaintiff establishing what he is owed and what price was obtained by the Plaintiff for his mangoes at the Melbourne markets.
17. Ms McLaren for the Plaintiff made much of the fact that the Defendant has not complained of the non receipt of invoices until the filing of his most recent affidavit and suggested that this was a recent invention. Ms McLaren highlighted the fact that the Defence filed by the Defendant made no

mention of the lack of invoices from the Plaintiff to the Defendant and suggested that shows it was not a concern until this application for summary judgment.

18. On the first hearing date of this application the submission from the Plaintiff was that they issue “invoices” to the supplier once the mangoes are sold with the price on those invoices. The Defendant in these proceedings states that he never received any invoices from the Plaintiff (see paragraph 6 of his affidavit). While the Defendant says that he was never advised by the Plaintiff of what was owed to him and it is true that there is no such complaint in the Defendant’s defence it is understandable that the Defendant would not complain about the invoices he didn’t know existed until he received Mr Ngyuen’s affidavit.
19. When the parties returned to the court for a further hearing on the 10th November 2006 the Plaintiff changed its story. The Plaintiff filed a further affidavit annexing invoices showing mangoes transported and those invoices are those produced on the Defendant’s letterhead. It is clear that the Plaintiff never sent the Defendant invoices setting out the prices received as the mangoes were sold.
20. The Plaintiff then produced its affidavit of the 5th of December 2006 and corrects its description of the invoices to freight notes which it claims were documents that would have been produced to the Defendant by the freight company when he delivered the goods to them.
21. The Plaintiff does not confirm that the Defendant was regularly, or at anytime, advised of the prices obtained for the mangoes until this litigation.
22. The Defendant’s main complaint is that for the 2003 mangoes he was not paid enough by the Plaintiff and for the 2004 season he was not paid the \$2:50 per kilo for Nam Doc Mai as agreed in an oral arrangement between

the parties he states that he requested an accounting from the Plaintiff but never received one.

23. Originally the Defendant did not produce any evidence to the Court of the amount and class of mangoes he forwarded to the Plaintiff in 2003 the Plaintiff made much of the fact that the Plaintiff has not produced the consignment notes for the transport of the 2003 mangoes. Nevertheless the Plaintiff has now produced documents showing the mangoes sent during 2003.
24. The consignment notes are not relevant in the dispute. The Defendant has not challenged the Plaintiff's statement showing the quantity or quality of the mangoes sent by the Defendant he only challenges the monies paid for those mangoes.
25. The Defendant originally produced some reports on the 2003 prices for the Sydney markets to establish the average price he says he should have been paid for the mangoes however he did not produce any evidence of the prices of mangoes in Melbourne at the relevant dates see annexure "B" to his affidavit of the 26th October 2006. He produced those reports at a later stage in the proceedings.
26. In relation to the 2003 season neither the Plaintiff nor the Defendant has put to the court how the parties were to work out what would be paid to the Defendant for the mangoes sent or what the Plaintiff would receive in return for its' services for selling these mangoes on consignment. The Plaintiff's calculations do not seem to include any payment to it for its services it purports to credit the Defendant with all the proceeds of the sale of the mangoes and not claim any commission or agents fees.
27. I would expect that if this were a true commercial relationship there would be some claim by the Plaintiff for a service fee or commission for the sale of those mangoes yet curiously there is not.

28. In relation to the 2004 season the Plaintiff claims that he has paid the Defendant monies in advance of consignment of mangoes in the form of payments for some transport, boxes and the purchase a mango crop for the Defendant. The Defendant is clearer in his evidence as to what the agreement was in relation to the 2004 season. He sets out the agreement in his affidavit in paragraphs 12,13 & 14 of his affidavit. Paragraph 14 sets out the basic terms as follows:

“ Further to our conversations Mr Nguyen and I orally agreed to conduce the mango business as follows:

(a) I would purchase the Nam Doc Mai mango orchard off Jaroon Rattarom.

(b) The Plaintiff will pay for the purchase of the Nam Doc Mai mango orchard of Jaroon Rattarom.

(c) The Plaintiff will pay for costs of transporting the Nam Doc Mai mangoes down to Melbourne to the Plaintiff

(d) the Plaintiff will pay for the Nam Doc Mai Mangoes to the defendant at a fixed rate of \$2:50 per kilogram, regardless of any fluctuations in mango prices in the fruit market. If the market price increased to over \$10:00 per kilogram the plaintiff will still only pay the defendant at \$2:50 per kilogram.

(e) I will look after the mango trees throughout the year which includes:

(i) watering the mango trees

(ii) insecticide spraying using the defendant’s own tractor including the purchase of the chemicals

(iii) hormonal treatment including the purchase of the chemicals

(iv) fertilisation including the purchase of the fertilisers

(v) pruning including the hiring of labour

(vi) labour hire for mangoes fruit picking

(vii) mango packing including labour hire and

(viii) general care and conduct to effect the picking, packing and transport of the mangoes.

(f) the Plaintiff would pay me monies for the mangoes sent to the Plaintiff on a regular basis. The balance of monies owing to me by the Plaintiff will be paid once the whole mango season was over.

29. It is clear from the Plaintiff’s evidence that it paid for the transport of some mangoes in that season, it paid to Rattarom \$22000.00 being part of the purchase price for the mango crop and it is also clear that these payments were made to third parties such as transport companies on behalf of the

Defendant as the invoices were made out to the Defendant as was the agreement to purchase the mango crop.

30. The Plaintiff claims that all of these payments were made in advance of the supply of the mangoes and because the Defendant has not been provided enough mangoes to cover those advances then he needs to account to the Plaintiff for those advances.
31. The Defendant claims that the payments made for the mango crop, transport and boxes were all part of the Plaintiff's obligations pursuant to the oral agreement between the parties as set out in his affidavit. The Defendant submits that by making those payments the Plaintiff has partly performed the contract and that is evidence the contract exists.
32. The Defendant does not address the Plaintiff's claim that it made several other cash payments to the Defendant in the 2004 season.
33. The Defendant also makes the bald statement in his affidavit that he upheld his part of the contract by undertaking all of the duties required of him to tend to the orchard and that the cost of doing so was approximately \$140000. The Defendant does not produce any independent evidence to support that claim although it is clear from the invoices attached to the Plaintiff's affidavit that the Defendant did ship the Nam Doc Mai mangoes to the Plaintiff in 2004. It is my view that it safe to assume that those mangoes came from the Rattarom farm which had been tended to by the Defendant.
34. When adjudicating a summary judgement application the court must be circumspect in granting the judgement. The principle is set out clearly by Lord Halsbury in *Jones v Stone* [1894] AC 122 at 124, where his Lordship said:

“The proceeding established by that order is a peculiar proceeding, intended only to apply to cases where there can be no reasonable

doubt that a plaintiff is entitled to judgment, and where, therefore, it is inexpedient to allow a defendant to defend for mere purposes of delay.”

35. This test was adopted by the High Court in Clarke v The Union Bank of Australia Ltd (1917) 23 CLR 5.
36. The court has to be convinced that there is no real question to be tried see Fancourt v Mercantile Credits Ltd [1983] 154 CLR 87.
37. In answer to an application a Defendant must do more than make general statements he must set out clearly and concisely what his defence is to the action. The Defendant’s obligation is set out clearly in the Williams Civil Procedure at paragraph 22.04.30 as follows:

“the affidavit of the defendant should condescend to particulars, and a mere general denial that the defendant is indebted to the plaintiff is not sufficient: *Wallingford v Mutual Society* (1880) 5 App Cas 685 at 704; *Re General Railway Syndicate* [1900] 1 Ch 365 at 369; *Cloverdell Lumber Co Pty Ltd v Abbott* (1924) 34 CLR 122 at 128–9. The affidavit should, as far as possible, deal specifically with the plaintiff’s claim and with the facts set out in the supporting affidavit to establish the claim, and state clearly and concisely what the defence is and what facts are relied on as supporting it: *Commonwealth Dairy Produce Equalisation Committee Ltd v Hansen* [1944] St R Qd 95; *Country Estates Pty Ltd v Leighton Contractors Pty Ltd* (1975) 49 ALJR 173; *Moscow Narodny Bank Ltd v Mosbert Finance (Aust) Pty Ltd* [1976] WAR 109; *General Credits (Finance) Pty Ltd v Grimm* [1978] Qd R 449. If the affidavit commences with a statement that the defendant is not indebted to the plaintiff in the amount claimed or any part of it, it should proceed to state the reason why the defendant is not so indebted and show the real nature of the defence. The affidavit should state clearly whether the defence set up goes to the whole or part only of each claim in respect of which the plaintiff applies for judgment, and in the latter case should specify the part to which it applies.

38. The Plaintiff’s first affidavit is detailed and set out in logical order and would on the face of it set out a strong case. However it is not certain on the Plaintiff’s evidence what the arrangement was for payment to the Defendant for the mangoes sent on consignment. Nowhere in the evidence of the

Plaintiff does Mr Nyguen set out what price was agreed to be paid to the Defendant. Nowhere in the evidence does the Plaintiff produce evidence of the market prices on particular days and how they translated to a “fair market price” or the “prevailing market price”. Questions must be asked about the basis of the calculation which result in the amount claimed by the Plaintiff ; Was the price to be the average market price on the day of delivery if so what was that price? Was the price to be the actual price the mangoes were sold for less some sort of commission? If the monies owed to the Defendant were to be paid on a consignment basis then why were the monies not paid on the exact amounts that were issued in the “invoices” instead of amounts that clearly did not relate to the invoices as set out in paragraph 7 of the Plaintiff’s affidavit.

39. It is for the Plaintiff to establish a clear enough case for summary judgement for the court to exercise its discretion to deny the Defendant the right to a hearing on the issues. It is for the Plaintiff to show that on its evidence the Defendant can not possibly have an arguable defence. The Plaintiff in this case has not done that. The Plaintiff has been inconsistent in its evidence about the basis of its calculations and the documentation. Further Mr Nyguen stated in his first affidavit that he sent “invoices” to the Defendant (which the Defendant denied) and then changed his evidence his later affidavit about the nature of those documents without explanation for this change. These inconsistencies would suggest that the Plaintiff itself is not certain of its own case.
40. The Plaintiff expects the court to accept that the price credited to the Defendant was either “fair market value” or “prevailing market price” yet doesn’t produce evidence to support that proposition.
41. For the reasons set out above the Plaintiff has not convinced me that it would be appropriate in this matter to grant it summary judgement.

42. However it is important to note at this stage that had the Plaintiff been clearer in its evidence about the terms of its agreement and the basis of its calculation the Defendant may have faced an order for summary judgement. The state of the evidence of the Defendant was highly inadequate considering he was faced with an application for summary judgment. Originally the Defendant made statements about average market prices without any documents or independent evidence to support those statements. The Defendant then produced market prices for the Sydney market when the mangoes were in fact sent to Melbourne. Finally the Defendant produced a price report for the 2003 season for the Melbourne market but not for the 2004 season.
43. The Defendant produced a schedule prepared by himself showing what he thinks he should have been paid but his calculations are based on the highest prices, not the average prices. The Defendant's evidence regarding the "agreement" relating to the purchase of the mango crop from Rattarom also had some inconsistencies as identified by the Plaintiff's counsel. The Defendant says that part of the agreement was that even though the agreement to purchase was between the Defendant and Rattarom the Plaintiff was to pay for the crop. The Defendant was to tend the crop, pick it and arrange for its transportation. However the Defendant then says that he paid \$8000 towards the purchase price. There is no suggestion that the Plaintiff was to reimburse the Defendant for that money. The Defendant then claims that the Plaintiff had promised to pay to the Defendant \$2.50 per kilo for the Nam Doc Mai mangoes. The question is if the Plaintiff was purchasing the crop for itself then why would it pay the Defendant again for the same mangoes.
44. All in all the evidence produced by both parties was inadequate.
45. I would expect that the defendant would want to make an application for costs given that the Plaintiff has failed in its application however I think it

is appropriate that I indicate that given the length of time it took for the Defendant to get its evidence into some semblance of order and given that the Plaintiff was unsuccessful this is an appropriate case where each party should bear their own costs I am not aware of any factors which would cause me to exercise my discretion on costs in favour of either party.

46. Given the above my orders are:

46.1 The Plaintiff's application for summary judgment is dismissed

46.2 Costs are reserved with liberty to apply.

Dated this 8th day of December 2006

Tanya Fong Lim
JUDICIAL REGISTRAR