

NZCA

**NOT
RECOMMENDED**

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

CIV 2003-419-218

BETWEEN	CAPRAL ALUMINIUM NZ LIMITED Appellant
AND	CENTRAL NORTH ISLAND ALUMINIUM LIMITED First Respondent
AND	HUGH GRANVILLE FOX LAITY Second Respondent

Hearing: 13 August 2003

Appearances: Stephen Price and Anthony Holmes for Appellant
Murray McKechnie for Respondents

Judgment: 13 August 2003

JUDGMENT OF HARRISON J

SOLICITORS

Bell Gully (Auckland) for Appellant
Jensen Waymouth (Taupo) for Respondents

Introduction

[1] As its name implies, Capral Aluminium NZ Ltd (“Capral”) manufactures and supplies aluminium extrusions. In 1997 it agreed to supply its products to Central North Island Aluminium Ltd (“CNIA”) on specific credit terms. The company’s owner, Mr Hugh Laity, guaranteed payment to Capral.

[2] In 2001 the relationship between the parties came to an acrimonious end. At that time CNIA owed Capral \$86,988 for goods previously supplied. The company refused to pay. Capral applied to the District Court at Hamilton for summary judgment for the debt on the ground that neither CNIA nor Mr Laity had an arguable defence to liability. Both opposed on the basis that, first, there was a genuine dispute about liability and, second, in any event the contractual arrangements provided for any dispute or difference to be referred to arbitration.

[3] On 22 October 2002 Judge MacLean DCJ effectively dismissed Capral’s application for summary judgment by staying it and referring the dispute for arbitration. Capral now appeals. Both counsel have raised a number of issues. But in my judgment they all collapse back into one question: is there a genuine dispute or real issue about liability? If so, the dispute should be referred for arbitration; if not, Capral is entitled to summary judgment.

Facts

[4] I agree with Mr Stephen Price, Capral’s counsel, that the facts essential to Capral’s claim are not in dispute. On 15 July 1997 the parties entered into an agreement whereby Capral granted CNIA a licence to use its propriety rights in certain aluminium products. Capral also agreed to sell CNIA aluminium extrusions for that purpose. The contract provided that “any dispute or difference arising between the parties concerning this agreement shall be referred to ...” arbitration.

[5] On 19 July 1997 CNIA made a customer credit application to Capral. The document included a written acknowledgement that the company and Mr Laity had read Capral’s standard form terms and conditions of sale and that they “... form the

contract for each purchase ...”. Those conditions provided, among other things, for CNIA to settle all invoices for goods supplied by the 20th day of the month following their dates. Furthermore, the conditions included a warranty limiting Capral’s liability for any claims for consequential losses to the cost of repairing or replacing goods or allowing a full credit. Mr Laity signed the application in his capacity as guarantor of CNIA’s obligations.

[6] Neither CNIA nor Mr Laity deny that Capral supplied product at a cost of \$86,988, which amount remains outstanding. Instead they dispute liability on two bases. In broad terms, one amounts to a right of set-off and the other to a counterclaim for damages. I shall deal with them in that order.

Right of set-off

[7] First, Mr Laity has sworn two affidavits. I mean no criticism to him in observing that most of the contents of both are either inadmissible or do not bear directly upon the dispute. The essence of his defence, and that of the company, is found in two separate letters which he wrote to Capral. The first dated 24 January 2001 raises what is in effect a right of set-off.

[8] In that letter Mr Laity particularised his complaints about Capral’s poor service over the preceding three years. He identified them as the source of “a major issue regarding our loss of production time and continued disruption to production schedules and sequencing”. He annexed a schedule of losses claimed by CNIA as a result of Capral’s alleged breaches of contract. Capral has misplaced the original schedule. However, Mr Laity produced an updated version, including the subsequent period from February to May 2001. Leaving items for those four months aside, the net amount of the company’s claim is \$13,831. The largest single item was for defective bronze anodising to a cost of \$3749.

[9] Mr Laity deposed that as a result of his letter he met Capral’s then general manager, Mr David Stampa, in Taupo. He said that Mr Stampa proposed that Capral would (a) provide CNIA with a crimping machine – its value was around \$6000; (b) increase discounts on sales by a figure of 2%; and (c) improve the quality of its

service. Mr Laity did not originally depose to his acceptance. However, in his second affidavit he stated unequivocally that he and Mr Stampa agreed on terms when they met at Taupo including returning the crimping machine and payment adjustments (from which I infer he was referring to the increased discount).

[10] After termination of their relationship CNIA returned the crimping machine. It claims an offset of \$6500 for this item. Capral's existing claim allows CNIA a credit of \$4363. The difference between the parties on this item is now \$2137 (\$6500 minus \$4363). Mr Price realistically abandons Capral's right to this sum, reducing its claim to \$84,851.

[11] In a later letter faxed to Capral on 28 June 2001 Mr Laity acknowledged that CNIA's set-off claim, after allowing for the crimping machine, was reduced to \$11,150. However, I am satisfied that Messrs Laity and Stampa had already agreed to compromise this claim when they met at Taupo some time after 24 January 2001. In part performance Capral supplied goods to CNIA at an increased discount. CNIA's subsequent election to terminate its contractual relationship with Capral does not operate to negate or invalidate the settlement. In my judgment CNIA has no genuinely arguable right of set-off for this amended net sum of \$11,150 or any other amount.

Counterclaim

[12] Second, Mr Laity relies on his later letter to Capral, undated but apparently sent in about January 2002 following a debt collector's visit. The letter is headed "without prejudice". A great deal of the argument before Judge MacLean focused on the admissibility of this document. Capral argued that it was inadmissible. Understandably the Judge devoted much of his judgment to the same issue. He concluded that the letter was admissible. He apparently endured a wide ranging argument on this subject; it also occupied a large portion of Mr Price's written synopsis on appeal.

[13] But, with great respect, the issue was diversionary. Plainly Mr Laity's letter was admissible. It was not a genuinely without prejudice communication at all. It

was simply the label given by a layman to his letter of denial of liability and recitation of a number of counterclaims. The letter did not advance any proposals for settlement or imply any compromise on CNIA's position.

[14] Mr Laity's letter identified six specific items of counterclaim to a total of \$213,987. I can deal with each item in short order:

- [1] CNIA's claim for \$15,524 was no more than a duplication of the set-off claimed and compromised about a year earlier;
- [2] CNIA claimed \$34,586 for wasted expenditure. Mr Laity described this as the cost incurred by the company in becoming a franchisee. The licensing agreement specifically excluded a relationship of that nature. In any event, his letter did not identify either a factually or legally sustainable basis for this head of alleged loss;
- [3] CNIA claimed \$5100, apparently being an amount withheld by one of its customers on a consequential contract. Mr Laity's letter asserted that Mr Gordon Dale, one of Capral's managers, had "already agreed to this refund". However, Mr Dale denies reaching any agreement with Mr Laity and, moreover, the conditions of sale exclude Capral's liability for it;
- [4] CNIA claimed \$50,000 for Mr Laity's personal stress. Self-evidently a company cannot recover general damages for a loss of this nature allegedly suffered by an employee;
- [5] CNIA claimed a further \$50,000 for what Mr Laity described as a loss of "opportunity to grow and develop and add value to the operation". To succeed, the company would have to prove actual damage. None is specified;
- [6] Finally, CNIA claimed the same amount of \$50,000 for loss of reputation and damage. This was essentially a duplication of its

previous claim. Moreover, Mr Laity did not identify any tangible loss.

[15] Additionally, CNIA claimed \$3000 for the defective bronze anodising work in December 2000, which was already the subject of its compromised set-off, and \$5777 for the crimping machine, which has already been resolved.

[16] It is well settled that the existence of a right of counterclaim does not operate as a defence to a claim for summary judgment. At best, it might justify a stay of the application pending determination. However, I am satisfied that CNIA's counterclaim is untenable for two reasons. First, Capral's liability is excluded by the warranty provisions contained in the contract of sale. Second, in any event, even if the exclusion clause was ineffective, none of the items of claim identified in Mr Laity's letter is factually or legally sustainable on the evidence. In these circumstances I have no hesitation in refusing to exercise my discretion to stay.

Conclusion

[17] It follows that I am satisfied that there is no genuine dispute or real issue between the parties justifying a reference to arbitration. I appreciate that Judge MacLean reached a different conclusion based on what he described as law and pragmatism. With respect, I disagree, but I sense that I may have approached Capral's appeal slightly differently from the way in which the case was argued before him. In submissions today Mr Murray McKechnie, counsel for CNIA and Mr Laity, did not question the approach which I have adopted, although he did of course argue that Mr Laity's letters were sufficient to create a genuine dispute.

[18] Accordingly, I allow Capral's appeal, except that I reduce the amount for which it is entitled to enter judgment from \$86,988 to \$84,851. It is also entitled to interest at the rate prescribed by the Judicature Act 1908 from 15 May 2002, and to costs both in the District Court and High Court for one counsel fixed according to category 2B.


Rhys Harrison J

Signed at 4.40 p.m. on the 13th day of August 2003