

**IN THE DISTRICT COURT
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKĀURAU**

**CIV-2016-004-000204
[2019] NZDC 2205**

BETWEEN

JASLIN ENTERPRISES NZ LTD
Plaintiff

AND

GRASSHOPPER LAWNMOWING
SERVICES LTD
Defendant

Hearing: 6 November 2018

Appearances: P McCutcheon for the Plaintiff
E Taia for the Defendant

Judgment: 12 February 2019

**RESERVED DECISION OF JUDGE P A CUNNINGHAM
[In relation to plaintiff's amended application dated 30 October 2018 for
standard and tailored discovery]**

Introduction

[1] On 6 January 2011 GT and SJ Peck Ltd (“the original contracting party”) entered into a contract with the defendant to undertake lawnmowing on the defendant’s behalf. The commencement date was 1 February 2011 with an initial term of five years. The plaintiff purchased the interest of GT and SJ Peck Ltd in the contract in early 2014. In January 2016 at the conclusion of the five-year term the plaintiff’s solicitor cancelled the contract.

The claim

[2] The statement of claim was filed on 19 February 2016. Since then four amended statements of claim have been filed, the last following the delivery of a decision of Judge G M Harrison on 26 April 2018. That decision related to an application by the defendant to strike out portions of the then current statement of claim. Certain portions of the statement of claim were struck out and directions were given as to the basis on which the plaintiff could maintain certain causes of action. The most current amended pleading responded to the directions and orders made by Judge G M Harrison.

[3] The plaintiff seeks discovery in accordance with a Schedule attached to the application. It also seeks costs on a solicitor-client basis in relation to:

- (a) quarter of the costs in discovery; and
- (b) costs in analysing wrongly redacted bank statements that states that the defendant has been contemptuous of the Court's processes and seeks costs on this application.

[4] Attached to this decision is a copy of the Schedule that seeks specific documents to which I will refer.

The plaintiff's case

[5] The contract was reduced to writing and the plaintiff claims that the defendant has breached the contract in a number of ways. The statement of claim is broken down into work carried out pre and post the assignment of the contract to Jaslin. So some of the alleged breaches occur twice. I intend to deal with them in a global manner, that is spanning the entire five years of the contract.

[6] The first alleged breaches occur at paragraph 37 of the (current) amended statement of claim, namely that:

- (a) Grasshopper underpaid the plaintiff for the work completed under the contract (to be particularised after discovery);
- (b) new work was not given to the plaintiff pre 2014, in particular, work at the Selwyn Foundation site in Pt Chevalier, Auckland.

[7] The next allegation is that the plaintiff was offered lawnmowing work in Hawkes Bay and purchased capital equipment in reliance on that work being available.

[8] In paragraph 56 there is an additional particular in terms of new work that was not offered to the plaintiff that should have been offered under the contract, namely the Waffle Farm road site.

[9] Next, it is alleged that Grasshopper took work away from Jaslin that it should not have at:

- (i) a Selwyn Heights site in 2014; and
- (ii) a Totara Park site in 2014.

[10] There is also an allegation that Jaslin performed the work under the contract adequately and should have been offered a further five-year term.

[11] No statement of defence appears to have been filed to the latest version of the statement of claim. However since it was filed on 6 June 2018 Mr Peter Luxford who is the director of Grasshopper has sworn an affidavit in opposition to the plaintiff's application in which he indicates the defendant's view of the allegations or most of them. From that document I have some understanding of the defendant's response to most of the allegations in the current version of the statement of claim.

First issue – defendant's bank statements

[12] This relates to redacted bank statements that have been supplied by the defendant to the plaintiff on 10 April 2017. Relevant to this issue are two affidavits

of Carolyn Janet McCutcheon who works for the plaintiff's solicitors. She is a chartered accountant.

[13] Attached to Mrs McCutcheon's affidavit is a document dated 6 November 2011 which is an email to Mr Graham Peck (of the original contracting company) stating that \$11,982.80 had been deposited into the contractor's account for lawnmowing work carried out during August and September 2011. Mrs McCutcheon notes that the redacted bank statements for the period 31 October 2011 to 30 November 2011 do not show any payments to the plaintiff (or its predecessor) and in particular the \$11,982.80 said to have been paid to the original contracting party on or about Sunday 6 November 2011. Several further examples of the same thing are exhibited. Ms McCutcheon attached all of the 266 redacted bank statements to her affidavit.

[14] Mrs McCutcheon filed a further affidavit on 4 October 2017. This relates to her analysis of the 2012 calendar year. She has attached nine remittance advices for the 2012 calendar year for which it appears bank statements have not been provided at all. At one point Ms McCutcheon states "the payments to our clients will be evident in their own bank statements".

[15] Mrs McCutcheon also refers to the fact that the contract provided that the plaintiff would receive 80% of what the defendant received for work carried out by the plaintiff. Using payment advices that have been received from the defendant Mrs McCutcheon makes the following statement at paragraph 15:

Using the receipts and the defendant's bank statements that I am able to see, and comparing those against the remittance advices provided, there appears to be a significant underpayment to the first payment regarding those simpler transactions we are instructed our client should have received 80% of ...

This refers to payments into the defendant's bank account and comparing those to what the plaintiff received.

[16] An affidavit by Jason Peck on behalf of Jaslin dated 26 February 2018 explains the work the plaintiff was carrying out. This was 80% of what the defendant was paid for the lawnmowing work. However this could be two different types of contract. Either a straightforward lawnmowing contract. However the defendant had contracts

for multiple services where the defendant undertook work other than lawnmowing like gardening, arborist's services, supplying plants etc. The plaintiff only carried out ride-on lawnmowing work.

[17] The unredacted bank statements show payments from those entities which Grasshopper had contracts with (predominantly retirement villages or other elder care facilities) and payments to the plaintiff.

[18] In his affidavit Mr Luxford explains that giving the plaintiff financial payments to Grasshopper by its clients is pointless because it would not enable the plaintiff to work out what it should have been paid for the ride-on lawnmowing work. That is because the contract covered lawnmowing and other services to the client.

[19] Mr Luxford attaches an email to Mr Graham Peck dated 21 March 2011 which has a list of customers and the price to be paid for the work. Mr Luxford describes this as agreement reached between him and the original contracting party as to payment for the ride-on lawnmowing work. He goes on to say that there was never any dispute or enquiry about how the amounts were made up. The plaintiff does not accept an agreement was reached.

[20] Mr Luxford has the following objections about providing unredacted bank statements to the plaintiff:

- (i) the main providers which are bulk payments to Grasshopper will not assist the plaintiff with alleged underpayments;
- (ii) rather the plaintiff should go through the weekly summary emails it sent to the defendant and cross reference this with the amount due under a monthly or per cut basis and cross match that to payments received into the plaintiff's bank account.

Analysis

[21] Rule 8.7 of the District Court Rules 2014 deals with standard discovery.

Standard discovery requires each party to disclose the documents that are or have been in that party's control and that are—

- (a) documents on which the party relies; and
- (b) documents that adversely affect that party's own case; and
- (c) documents that adversely affect another party's case; and
- (d) documents that support another party's case.

[22] Mrs McCutcheon's affidavit provides evidence that the plaintiff has documentation (emails from the defendant) showing that payments were supposed to have been made on a number of dates but those are not showing up in the defendant's bank account. Having said that some of those payment advices from the defendant which are attached to Mrs McCutcheon's second affidavit sworn on 4 October 2017 (over the 2012 period) were noted as either paid by cheque or cash. In relation to payments by cheque, presumably they should be showing up in the defendant's bank account. In terms of the cash payments if money was withdrawn from the bank account that should be showing in the bank statements too.

[23] The pleading at para 56a of the present statement of claim that Grasshopper underpaid Jaslin for work completed is relatively new. The third amended statement of claim (dated 15 September 2017) contained a statement that Grasshopper did not pay Peck completed under the contract (estimated to be \$191,259.04). Prior to that, the complaint was around late payment.

[24] So far the evidence that supports the pleading in para 56a is scant. In relation to those contracts Grasshopper had with clients which were strictly ride-on lawnmowing contracts is the statement in Mrs McCutcheon's affidavit at para [15] herein. No particulars are given of any one or more example.

[25] The exercise undertaken in relation to no corresponding withdrawal from the defendant's redacted bank statements is not proof of underpayment. As Mrs McCutcheon states (see para [14] herein) the plaintiff has not cross referenced the email advice of payments made by Grasshopper either to its own bank statements or other accounting records.

[26] Mr Luxford for the defendant states that provision of redacted bank statements over five years was at “great cost”. He also says (para 7):

The reality is that the plaintiff is fishing for information to support its allegation based on no evidence whatsoever that it was underpaid over the course of the contract.

At para 18 Mr Luxford says that the shortfall in payment of \$150,000 to \$200,000 over a three-year period is essentially the entire amount due and paid over that time period.

[27] At this stage the relevance of any documents held by the defendant to this pleading is questionable. This is because the plaintiff has not cross-referenced the emailed payment advice to its own banking and financial records.

[28] It is up to the plaintiff to prove its case. I accept the submission made by the defendant that discovery is not a fishing expedition and is not condoned by the Courts (relying on *Commerce Commission v Cathay Pacific Airways Ltd*¹ and *Nathan's Finance New Zealand Ltd (in receivership) v AIG Insurance New Zealand Ltd*.²)

[29] I decline the plaintiff's application in relation to further disclosure of the defendant's bank statements. Because the plaintiff has not provided any credible evidence to support the allegation in para 56a.

The second category

[30] These are contracts the defendant had with its clients. The allegations in the statement of claim referred to work at Selwyn Foundation site in Pt Chevalier (“Selwyn”) and Wattle Farm in Pukekohe.

[31] In terms of Selwyn, Mr Peck explained that the defendant has since 2012 been ride-on catch-mowing at this site. On 22 November 2017 a notice to admit facts was issued in the following terms:

You (or your employers or another contractor appointed by you) have been mowing by ride-on catch since 2012 at the site at Selwyn Village in Pt Chevalier.

¹ [2012] NZHC 726 at [13].

² [2013] NZHC 3137 at [34].

[32] The notice has not been responded to and Mr Luxford does not specifically respond to this in his affidavit. I am therefore of the view that any work that should have been given to Jaslin under the contract at the Selwyn site is at issue in the proceeding and documentation relating to new work carried out by Grasshopper or another party on its behalf should be disclosed.

[33] Mr Luxford is concerned about commercial sensitivity. There must be a way in which he can provide the front page of the contract and the relevant portion in relation to lawnmowing and the price. I leave it to counsel to discuss this issue and if counsel cannot agree, leave is granted to file a memorandum in relation to appropriate confidentiality orders.

[34] In relation to Wattle Farm, Mr Peck states in his affidavit that they saw the defendant using a ride-on catch-mower at a new rest home in Wattle Farm in Pukekohe during the term of the contract. This provides a credible basis for the claim. Therefore documentation relating to any work that the defendant is or has undertaken at Wattle Farm Road, Pukekohe is relevant and should be disclosed.

[35] As to the balance of the second category, in my view the scope is too wide. A party must have some basis for alleging there has been a breach of contract. In relation to Selwyn and Wattle Farm Road some evidence has been provided by the plaintiff. Without more, I regard all contracts with any commercial retirement village or aged care facility in the greater Auckland area to be too wide and amounting to a fishing expedition.

Third category – invoices

[36] Mr Luxford states that he objects to producing these on a number of bases which I summarise as follows:

- (a) relevance;
- (b) commercial sensitivity;
- (c) oppression.

It is up to the party seeking discovery to link the documents sought to an allegation in the statement of claim. There simply is no allegation in the statement of claim that justifies the making of an order in relation to invoices Grasshopper sends to its clients.

Tender documents

[37] I am assuming that the basis for seeking tender documents is to see whether or not the defendant has undertaken work that should have been given to the plaintiff. I have already said that discovery cannot be a “fishing expedition”. That is what this aspect of the application is. Moreover Mr Luxford states that tender documents do not exist.

Fifth category

[38] These are said to be documents showing how Grasshopper calculated the amount due to plaintiff. In the voluminous amount of material provided by the plaintiff in support of this application, there is not one which contains a complaint by the plaintiff or the original contracting party about the basis on which the defendant was calculating the payments. This issue seems to have arisen as a result of the exercise undertaken by the plaintiff’s advisers in relation to alleged “underpayment”. An exercise which is incomplete for reasons already given.

[39] The defendant’s position on this is twofold, namely that payments were agreed at the outset and secondly, that there have never been any complaints about how the amount has been calculated.

[40] There is no sufficient basis on which I am able to make an order for discovery of this category of documents.

The financial accounts

[41] This relates to advertising. Mr Luxford states that Grasshopper undertakes advertising on its website and therefore did not have any advertising costs so invoices do not exist. He goes on to say that Jaslin and the originating contracting party were

operating at capacity and working most weekends and did not accept some work when it was offered to them because of how busy they were.

[42] Looking at this from the plaintiff's point of view, it is up to the plaintiff to establish that a lack of advertising by Grasshopper was a breach of a contractual provision and/or that loss of profits flowed from that breach.

Application for costs

[43] This is on the basis of rule 8.22 which is set out as follows:

- (1) If it is manifestly unjust for a party to have to meet the costs of complying with an order made under this subpart, a Judge may order that another party meet those costs, either in whole or in part, in advance or after the party has complied.
- (2) Despite subclause (1), the court may subsequently discharge or vary an order made under that subclause if satisfied that a different allocation of those costs would be just.
- (3) If an order is made under rule 8.20(2) or 8.21(2), the Judge may, if the Judge thinks it just, order the applicant to pay to the person from whom discovery is sought the whole or part of that person's expenses (including solicitor and client costs) incurred in relation to the application and in complying with any order made on the application.

[44] For the defendant Mr Taia submitted that rule 8.22 sets a high bar by the use of words "manifestly unjust". The basis for this application by the plaintiff seems to be that the defendant has lost a number of documents. This was because of a computer failure in 2013 and 2014. This is not uncommon. Moreover I am unsure how this has caused the plaintiff work that it would not otherwise have had to do. The application for costs is declined.

[45] There is then an application to be paid time for going through the redacted bank statements. As this aspect of the application has been declined, it follows that there cannot be any award of costs to the plaintiff.

Contempt

[46] Rule 8.33 of the District Court Rules says:

- (1) Every person is guilty of contempt of court who, being a person against whom a discovery order or other order under this subpart has been made, wilfully and without lawful excuse disobeys the order or fails to ensure the order is complied with.
- (2) This rule does not limit or affect any power or authority of the court to punish a person for contempt of court.

[47] The defendant filed its list of documents in November 2016. The plaintiff did not provide its list until 11 October 2017. The phrase “the pot calling the kettle black” comes to mind.

[48] I am unable to see any proper basis for this aspect of the application.

Costs on the application

[49] The plaintiff has been successful in relation to one (in part) of the six orders sought and unsuccessful in relation to the other five. It is possible that the defendant may wish to apply for costs. Any memorandum seeking costs should be filed within 21 days if that is so. The plaintiff has 14 days thereafter to reply. I will determine any costs application on the papers.

Dated at Auckland this 12th day of February 2019 at _____ am/pm.

P A Cunningham
District Court Judge

SCHEDULE

1. Unredacted bank statements of the defendant for the period 6 January 2011 to 27 January 2016 (“the period of the contract”) for any bank account into which money was paid by commercial clients for whom the plaintiff or GT & SJ Peck Limited mowed (or should have mowed) lawns under the contract dated on or about 6 January 2011 (“the contract”), or from which the plaintiff or GT & SJ Peck Limited were paid.
2. All contracts the defendant had with any commercial, retirement village or aged care facility customer (“commercial customer”) in the greater Auckland area (i.e., between Franklin and Warkworth) – “Greater Auckland” – within the period of the contract and any amendments to them.
3. All invoices the defendant sent to its commercial customers in Greater Auckland, within the period of the contract.
4. All tender documents the defendant submitted regarding any work it did for any commercial customer in the Greater Auckland Area, within the period of the contract.
5. All other documents (including software, work sheets, and notes) showing how the defendant:
 - a. Calculated what to charge any commercial customer in any instance within the period of the contract, and how the defendant broke down or analysed that charge with reference to the different services the defendant provided; or
 - b. Calculated what to pay the plaintiff or GT & SJ Peck Limited in any instance, within the period of the contract.
6. Financial accounts of the defendant for the financial years, 2011, 2010 and 2009 (to establish its multiplier regarding advertising expenditure to income heading into the period of the contract).