IN THE DISTRICT COURT
AT NEW PLYMOUTH

CIV 2015-085-687
[2018] NZDC 14451

BETWEEN	FORTHRIGHT LIMITED Plaintiff
AND	REMEDIATION (NZ) LIMITED, TRADING AS REVITAL FERTILISERS Defendant

Hearing:	20 November 2017, and 15 January 2018
Submissions:	20 January 2018, and 20 February 2018
Appearances:	Ms Blomfield for Plaintiff Ms Pascoe for Defendant
Judgment:	16 July 2018

RESERVED DECISION OF JUDGE L I HINTON

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[1] This is a contractual claim by Forthright Limited (Forthright) against its former customer Remediation (NZ) Limited, trading as Revital Fertilisers (Revital).

[2] Broadly, the claim by Forthright is for transport costs associated with the delivery of phosphate fertiliser sold by Forthright to Revital, one particular alleged delivery of fertiliser, and for associated costs and interest claimed because of late payment by Revital. Revital denies liability for the total of Forthright's claim.

[3] There is some documentation concerning the parties' relationship. A Forthright credit application for a business account was completed by Revital on 7 May 2013 (the 'credit application') and associated written terms and conditions of sale (the 'terms and conditions') are agreed to apply to the relationship. Those terms and conditions deal with payment terms, essentially.

[4] There is also a brief proposal dated 24 June 2013 signed by Mr van Dam (the director of Forthright) which deals with certain pricing and specification and rebate conditions in relation to proposed product purchases (the 'June proposal'). That document is agreed to be operative between the parties, although they have different views on its interpretation or effect.

[5] As well, there were ancillary related oral agreements or understandings, and some correspondence, which were variously said to be relevant in relation to the June proposal or, more accurately, the terms upon which certain supplies of product subsequent to the June proposal had been made by Forthright to Revital.

[6] In addition, a claim for payment for a particular delivery of product in November 2014 which Forthright said it had made and Revital said had not been made, involved consideration of related other documentation, because the core usual documents or records of purchase and delivery were not now available or, in Revital's view, never existed.

[7] The main players in each of Forthright and Revital were able to give evidence. For the plaintiff, in addition to Mr van Dam, evidence was given by Mr Steven Tomlinson, a Director of Koru, a customs broker and freight forwarding company, and by Ms Sharon Lilley, the office manager at Freight and Bulk Transport Holdings Limited (FBT) a transport company. For the defendant, evidence was given by Mr David Gibson, director, Mr Mark O'Neill, sales manager and Ms Dellwyn Broadmore, financial / administration manager, of Revital.

Issues

[8] For convenience, I follow the parties' agreed issues that require determination:

(a) What was the agreement between the parties as to the payment of transport costs for bulk products?

(b) Was a delivery of 50 tonnes of Forthright's Phosta granules made to Revital on 17 and 18 November 2014?

(c) Was there agreement about when the balance of Forthright's invoice 422 would be paid?

(d) Can Forthright recover from Revital its collection and legal costs (invoice 462) for the recovery of the balance owed under invoice 422?

(e) Can Forthright recover from Revital its legal costs associated with the recovery of the amounts owing under:

(i) Invoice 445 (for the delivery of 50 tonnes of Phosta granules to Revital in November 2014); and

(ii) Invoice 448 (for the transport costs for taking containers from the port to an ATF, unpacking them and then delivering the bulk product to Revital)

(iii) Invoice 462 (for Baycorp's collection and legal costs for recovering the balance owed under invoice 422)?

(f) Can Forthright recover from Reivtal interest on the outstanding amounts of invoices 445, 448 and 426?

[9] I deal now with each of those items in turn.

Transport costs for bulk product

[10] Forthright was a purchaser of phosphate fertiliser from suppliers overseas and on sold fertiliser to customers in New Zealand in two forms, bagged or in bulk. All such fertiliser product entering the country must be unloaded at an Approved Transitional Facility (ATF).

[11] The June proposal did not deal specifically with a freight rate or other costs in relation to bulk product. The proposal did state that in relation to bulk product: "you will need to be an approved ATF to do this. We can help you set this up".

[12] In the event, Revital never attained ATF status, notwithstanding intimations, as Revital saw it, that ATF status might be sought. As Forthright saw it, Revital's intentions were more stark and serious, and entitled Forthright to assume ATF status was for relevant purposes attained or imminent.

[13] So, the case for Forthright is straightforward – when relevant orders for product were filled for Revital post August 2014, allegedly for imported bulk product, then it followed associated transport costs would be incurred if Revital did not have ATF status. The case for Forthright draws on the June proposal's reference to pricing being unpacked ex-ATF with a current freight rate then from ATF to Revital to be passed on, with, in contrast, a reference to bulk product requiring an ATF. Further, however, and more significantly, Forthright maintains that core propositions inherent in its claim were agreed to (orally) by Mr O'Neill at the time of the proposal and at a meeting held on 24 July 2014 between Mr O'Neill and Mr van Dam, where Mr O'Neill had expressed interest in purchasing containerised bulk product.

[14] Invoice 448, which is the relevant claim for transport costs, is for the delivery of bulk product to Revital's premises, 6 November 2014, 10 December 2014 and 18 March 2015. This invoice was sent on 14 August 2015 for a total claim now of $6,544.20 for unpacking and delivery charges for bulk product which Forthright says Revital actually ordered.

[15] Overall, I considered Mr van Dam reasonably clear and consistent in his evidence on Forthright's view of the incidence of transport costs, notwithstanding that at one point he appeared a little unclear, and not convincing.

[16] There were mixed messages in evidence from Revital on the issue. I frankly thought that Revital's witnesses may not fully have understood, or even now understand, the differences in the product pricing and so forth which appeared to be the basis of Forthright's claim. Each Revital witness seemed to have a slightly different story to tell. None seemed naturally able to deal with the pure Forthright proposition as I understood it.

[17] There was actually a degree of in court education conducted by Ms Blomfield in cross-examination, which was (necessarily) painstaking. This was frankly all suggestive of a lack of consensus between Forthright and Revital.

[18] Mr Gibson was not a party to original discussions on the June proposal. Nevertheless, he accepted bulk product would be more costly, and bagged was preferred. Mr O'Neill was alternately vague, sometimes apparently confused, then at other times (inconsistently) seemingly direct and almost anxious to agree with Ms Blomfield. Ms Broadmore suggested transport was included in a "unit price" or alternatively that demand was too late.

[19] The reality is that there are two related issues here. The first is whether or not there were agreed terms of trade which incorporated relevant on-charging of the transport costs. It is superficially attractive to assume this, given that one might assume a cheaper price for containerised product would not otherwise be available. But there was no requisite specificity around this and support for Forthright's case must be gleaned from discussions with Mr O'Neill.

[20] On that, I had some concerns as to whether there was a consensus. At the most there may have been agreement that not quantified additional cost would be incurred if ATF status did not exist.

[21] Irrespective, the other issue is whether, on the basis of ATF certification, Mr O'Neill had actually ordered bulk product by agreement with Mr van Dam that ATF certification was available or imminent or guaranteed. After all, this is really the nub of the Forthright claim. On that, the evidence was simply not clear at all as to the basis upon which Forthright could assume, for purposes of this claim, that Revital had agreed to additional not specified unpacking/transport costs absent certain and definitive ATF accreditation which Revital had underwritten. I could not find that any relevant representation had been given by Revital to have founded any relevant assumption by Forthright, or that such assumption altered any terms of contract or founded a contractual claim.

[22] I could not conclude on the evidence that Mr O'Neill ordered bulk product on the basis of having, or in anticipation of immediately achieving, ATF status. I do not think Mr O'Neill intended Revital pay more, or run the risk of paying more, for the product. Nor, to put it simply, did Mr O'Neill guarantee ATF status.

[23] I was not satisfied on the balance of probabilities that Revital was liable in relation to invoice 448.

[24] There was no actual consensus concluded. As Ms Pascoe was to put it in effect, Mr O'Neill did not intentionally incur avoidable cost. I was not satisfied that there was any relevant ordering of bulk product by Revital that it was on terms it would incur the costs.

[25] So I concluded there was no agreement on payment of the claimed costs on the relevant orders.

Delivery or not on 17 and 18 November 2014

[26] Forthright issued Invoice 445 to Revital on 31 July 2015. This invoice concerned an alleged delivery of 50 tonnes of Phosta granules to Revital's premises, nearly nine months earlier, on 17 and 18 November 2014. Specifically, there were alleged deliveries of 25 tonnes each day.

[27] Revital was unable, on receipt of the invoice, to reconcile any such delivery within its own records, Revital having no evidence of the product being entered into its system as stock on hand. Revital rejected any suggestion that the claimed delivery took place.

[28] In Ms Pascoe's opening, she noted that Forthright had been unable to provide any documentation to confirm a purchase order was made from Revital, or any FBT delivery docket or waybridge documentation to confirm delivery or loading.

[29] To succeed here, Forthright relies on a range of documentation short of actual usual evidence of purchase and delivery, covering shipping and transportation records.

[30] On this aspect of the claim, Forthright was in a stronger position. Overall, I was able to accept the plaintiff's evidence and argument. I allow that at times Mr van Dam lacked optimal assurance. Indeed, he was, perhaps flustered on occasions. But overall, the portrait painted by the evidence and documentation suggested to me delivery had taken place.

[31] The fact that not ideal documentation was available was not necessarily the fault of Forthright. The reality was that any documentation on the delivery had been discarded by FBT, on the evidence of Ms Lilley, as to FBT's practice, which I accepted. Of course, as Ms Pascoe noted, another explanation was that there was no such documentation anyway, but I concluded otherwise. For completeness, I was not troubled by Mr van Dam's evidence of recollection of a purchase order number some months later.

[32] The lack of documentation verifying a valid purchase order received from Revital was also not fatal. Verbal telephoned orders had at times been given by Mr O'Neill, often not accompanied by a valid purchase order number.

[33] I accepted that the E-Road documentation confirmed visits by FBT's vehicle to Revital's premises on 17 and 18 November 2014. I could not conclude there was any significant or relevant disagreement on that from Revital's witnesses. I accepted Ms Lilley's evidence that these would have been deliveries. I discounted any suggestion that these were deliveries of chicken manure or any other product, based on Ms Lilley's evidence. Moreover, Mr O'Neill's evidence was that deliveries of chicken manure were not likely, and Ms Broadmore's disappointment with Mr O'Neill's evidence, and contrary proposition in relation to chicken manure, was not persuasive. I noted that, as to an actual delivery (content aside) having taken place, Mr Gibson agreed that on the face of it, it had, Mr O'Neill was alternately uncertain and reluctant to deny it had, and Ms Broadmore agreed it had, at least on 17 if not 18 November 2014.

[34] I was satisfied, in addition, that the delivery trucks were not empty and contained relevant fertiliser product (to a total weight of 50 tonnes based on the FBT invoice and E-Road documentation) imported from Indonesia and which was not

chicken manure. I accepted Mr van Dam's evidence, and Mr Tomlinson's supporting evidence, that Forthright then only had one customer in New Plymouth, namely Revital.

[35] I considered the Customs Delivery Order referencing the relevant two container numbers and the FBT job number, and FBT's invoice to Koru dated 19 November 2014 which refers to that order and the containers, in relation to and supporting a delivery to Revital.

[36] Ms Lilley's evidence regarding the order master job sheet formed also a relevant part of the portrait. As was Koru's invoice numbered 8868A to Forthright concerning fertiliser imported by Forthright with the same container numbers as the Customs Delivery Order.

[37] Of course, some at least of this evidence was not controversial and was accepted by Revital. But, nevertheless, Revital challenged the final link of delivery into Revital's premises of the fertiliser product, about which I was satisfied.

[38] I was satisfied on the balance of probabilities that a delivery of 50 tonnes of Phosta granules had been made to Revital, as claimed by Forthright.

The payment of invoice 422

[39] The question here is simply whether there was agreement between the parties that late payment of the balance owing under Invoice 422 was permissible such that Forthright is precluded from recovery of Baycorp charges.

[40] Essentially, Revital accepts that Invoice 422 was paid after the due date for payment required under the terms and conditions. The proposition is, however, that there was a practice, or perhaps specific remission on this occasion, equivalent to a contractual term that late payment was permissible, overriding the terms and conditions. In particular, Revital claimed that, in relation to Invoice 422, late payment by Revital had been confirmed without any concern expressed by Mr van Dam. In essence, the agreement allegedly was that payment of the balance owing, would be

made by the end of August 2015. Revital said that Mr van Dam improperly referred the matter to Baycorp in August prior to that agreed due date.

[41] I accepted Mr van Dam's evidence that there was no agreement that payment could be made of the balance at the end of August 2015 with Forthright's rights and remedies under the terms and conditions precluded. I accepted Mr van Dam's evidence regarding his discussions with Ms Broadmore and Mr Gibson. In my view, the balance owing under Invoice 422 was due and owing and payable in full within the 60-day period specified in the terms and conditions. I do not accept that Forthright had by its general conduct or any "general practice," or specifically in July 2015 in relation to Invoice 422, waived any of its rights or remedies in relation to (enforcement of) the terms and conditions.

[42] I should note, for completeness, that the actual evidence of Revital here fell rather short of establishing any contractual term. Mr Gibson referred to his understanding (from Mr O'Neill) that Forthright was "flexible", Mr O'Neill referred to the fact that Mr van Dam was, or at least used to be, "accommodating", and Ms Broadmore referred to the "fluid" nature of the arrangement which overrode the contractual terms.

[43] Clause 7 of the terms and conditions, although not well drafted, can be read as an acknowledgement that Revital accepts liability for payment on time of amounts owing to Forthright, together with reasonable collection charges. To give that commercial efficacy the fee invoice of Baycorp must be payable. In any event, although Revital protests that no charges are payable as a matter of contract, there was no objection that if I concluded the charges were payable, they could nevertheless be questioned as excessive or unreasonable, or otherwise.

Recovery of legal costs

[44] The plaintiff's position is that it is entitled to legal costs under clause 7 of the terms and conditions. This clause refers to liability for any associated legal costs.

[45] The plaintiff says in relation to the Invoice 445 claim, that notwithstanding incomplete paperwork being available, Revital wrongly refused to accept what paperwork was available as evidence of delivery, and thus legal proceedings have been inevitable for Forthright to recover money owing to it. It was said to follow that any such legal costs were payable by Revital.

[46] Revital's position is that it was reasonable to, and it was entitled to, request supporting documentation in relation to an invoice nine months following a purported delivery which had no supporting documentation, and which Revital had no record of. Revital had considered such documentation as was provided to be inconclusive and cannot be faulted for doing so. Ms Broadmore noted not all documentation had been received and much was received piecemeal anyway. Moreover, Revital complains of early improper reference of the matter to Baycorp and for legal assistance.

[47] I think that Revital can properly object to any Baycorp commission or other Baycorp charges which might be levied, although I do not know that other charges have been. In that regard, I assume that the Baycorp charges referred to above relate to Invoice 422 only.

[48] In any event, I consider that the additional reimbursement items in clause 7 of the terms and conditions do not relate to a delivery or purchase or goods under the present circumstances. The relevant event or transaction was a delivery or purchase which needed to be established and for which there was no evident and sufficient usual documentation available. In my estimate, there were reasonable grounds on the part of the (deemed) "purchaser" to decline payment.

[49] The fact is that a delivery and purchase here could really only be established once all the evidence had been provided or even heard and which was never all available to Revital, or available promptly at least, notwithstanding Mr van Dam's assumptions (without complete documentation) months after the event. The fact I agree now with Mr van Dam is beside the point. Moreover, I have not overlooked that Revital was not able, on the evidence of its witnesses, to account for the (extra) delivered product on its stocktake.

[50] Under all those circumstances, it would be intolerable for all legal costs to be recovered, and it was not, in my view, intended by the terms and conditions they would be. Alternatively, the reference in the terms and conditions to legal costs means, in my view, "reasonable legal costs" and such legal costs would not be reasonable.

[51] No legal costs are recoverable in relation to the claim for $6,544.20 in respect of unpacking and delivery costs. I have found that the particular claim on that invoice failed.

[52] No legal costs are payable by Revital with respect to Invoice 462 which apparently relates to collection costs and legal costs, as in my view Clause 7 does not provide clearly that such costs are payable.

[53] I have concluded, nevertheless, that a modest award of legal costs is appropriate, in relation to Invoice 445. It is not possible to affect any scientific measure, but the Court should not shirk from an award where it would be appropriate. I think it is appropriate because at a point in time (prior to the hearing) it should have been reasonably clear to Revital all the pieces of the delivery puzzle were falling into place.

[54] I do not know the make-up of the legal fees charged to date or their reasonableness, but on the face of it they do not appear unreasonable. I think an allowance of $3,000. is appropriate.

Recovery of interest

[55] In relation to Invoice 445, for the reasons set out above in connection with legal costs, I do not consider that total interest is payable, because interest is not, in my view, applicable to this particular invoice rendered unsatisfactorily nine months following a delivery which needed to be substantiated.

[56] That said, Revital has had the benefit of the product (even if it has not realised it) and Forthright has not been paid (although Forthright is not blameless on that count). In those circumstances, some interest should be paid under the contract. A

reasonable interest rate of 5% should apply from a reasonable date following the date of the invoice, namely 1 August 2016.

[57] No interest could be payable in relation to Invoice 448 which I have concluded Revital is not liable for.

[58] As to Invoice 462, I do not believe clause 7 to apply to interest on collection costs. Rather, the terms and conditions provide for an interest charge in relation to invoices for goods purchased. Having regard to the terms of clause 7, the clause primarily is about "repayment" rather than payment of "credit" (mistakenly, to Revital) and, if interest is payable, only then when it is associated with repayment of the "credit." This does not mean interest is payable on collections costs. The same argument applies to interest on legal costs, which cannot constitute invoices to which the terms and conditions relate.

Result

[59] Forthright is entitled to judgment for:

(a) $21,850, under Invoice 445;

(b) Interest on $21,850 under Invoice 445, at the rate of 5% per annum from 1 August 2016;

(c) $3,000 for legal costs, in relation to Invoice 445; and

(d) $7,197.08, under Invoice 462.

[60] Forthright's other claims are dismissed.

[61] On costs in the proceedings, my view is that costs should likely lie where they fall. The parties have each had a measure of success. If any issue as to costs remains unresolved after three weeks, then the plaintiff should file a memorandum by 16 August 2018 and the defendant three weeks later.

L I Hinton
District Court Judge