IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA248/2023
[2023] NZCA 536

BETWEEN	KERRY LOGISTICS (OCEANIA) LIMITED Appellant
AND	VIENNA GROUP LIMITED (IN LIQUIDATION) Respondent

Hearing: 4 October 2023

Court: Mallon, Churchman and Osborne JJ

Counsel: D J Cooper KC and S D Campbell for Appellant
P C Murray for Respondent

Judgment: 30 October 2023 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is allowed. There is summary judgment for the appellant.

B The respondent must pay the appellant costs for a standard appeal on a band A basis, together with usual disbursements. We certify for second counsel.

C The issue of costs incurred in the High Court is remitted to that Court for determination.

REASONS OF THE COURT

(Given by Osborne J)

Introduction

[1] The respondent, Vienna Group Ltd (Vienna), (now in liquidation), was an importer of beer. Kerry Logistics (Oceania) Ltd (Kerry), pursuant to a contract, provided Vienna with New Zealand Customs Service (Customs) clearance services between September 2011 and January 2015. On 30 June 2021 (incorrectly referred to in some materials as "29 June 2021"), Vienna issued High Court proceedings against Kerry for breach of contract and negligence, claiming damages for what were alleged to be failings in Kerry's services.

[2] Kerry applied to the High Court for summary judgment on the claim or, alternatively, an order striking it out. Kerry asserted that the claim was filed outside the limitation period and that liability was excluded by provisions in the contract.

[3] In the High Court, Associate Judge Sussock dismissed both applications.[1] Kerry was granted leave to appeal the High Court decision in relation to the dismissal of both applications.[2] The appeal raises issues both as to the application of the limitation period applying to the claim under s 11 of the Limitation Act 2010 (the Act) and the interpretation of contractual exclusion clauses both generally and in relation to the provisions of the parties' contract.

[4] We have concluded the appeal must be allowed on the basis the claim was filed outside the limitation period — Kerry has established that neither of the causes of action in Vienna's claim can succeed. We would also allow the appeal on the basis the exclusion provisions excluded Kerry's liability for the damages claimed.

Factual background

[5] In the High Court, the Associate Judge set out the factual background:

> [20] Imported alcohol products are subject to duty in New Zealand. Duty on imported beer products is based on the alcohol strength of the product. Lower strength alcohol products attract lower duty than full strength products. If the

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1 *Vienna Group Ltd (in liq) v Kerry Logistics (Oceania) Ltd* [2022] NZHC 1473 [High Court decision].

2 *Vienna Group Ltd (in liq) v Kerry Logistics (Oceania) Ltd* [2023] NZHC 846 [leave decision]. The appeal proceeds by way of a rehearing as a general appeal: Court of Appeal (Civil) Rules 2005, r 47.

alcohol strength of a product is understated in Customs entries, the importer pays less duty than they are legally required to by the Customs and Excise Act 1996 (CEA), the legislation applying at the time.

[21] Kerry provided Customs clearance services to Vienna for imported alcohol products from September 2011 to January 2015.

[22] The contract between Kerry and Vienna is in the form of an application form for a credit account. I record that when the contract was first entered into on 12 September 2011 Kerry was known as Lead Logistics Limited.

[23] The application form is signed by Vienna and says that Vienna has read, understands and agrees to the Terms and Conditions supplied with the application. Kerry's standard terms and conditions of trade are attached.

[24] Kerry's evidence is that when a consignment of imported beer arrived Kerry would receive a bill of lading from the origin agent. Kerry would also receive a commercial invoice from Mr Browne, Vienna's director, which had been issued to Vienna by the overseas supplier. When the invoice disclosed the alcohol strength, Kerry used that information to complete the consignment entry. Kerry's evidence is that this was often not the case and so it would then telephone Mr Browne from Vienna for the alcohol strength information. Kerry says there was a note to this effect in Kerry's "Cargowise" system. Mr Browne disputes this but this issue does not need to be resolved for the purposes of this application.

[25] On 11 February 2015, Kerry and Vienna were advised that Customs would be conducting an audit of 15 entries submitted by Vienna. The audit found that several entries understated the alcoholic strength of the imported products. On 13 March 2015 Vienna was advised of these findings and that a full audit and investigation would be undertaken by Customs of Vienna's import entries since March 2011.

[26] Customs advised Vienna of the findings of its investigation by letter dated 5 June 2015 with an Assessment Notice issued for the "short payment" of duties and levies of $2,225,905.95 (Assessment Notice). The due date for Vienna to make payment or file an appeal was 3 July 2015. Vienna did neither. As it was unable to pay the assessed duties, Vienna was placed into liquidation by shareholders' resolution on 23 July 2015.

[27] In addition, on 11 May 2016, Customs imposed an administrative penalty on Kerry of $67,702.21 under s 128A of the CEA.

[28] Kerry advised Customs that it had relied on alcohol strength information from Mr Browne. However, Customs still imposed a penalty because Customs considered that it was not reasonable for Kerry to rely on verbal confirmation only.

[29] In response to a request for reasons, Customs advised Kerry that reg 27 of the Customs and Excise Regulations 1996 (CEA Regulations) provided that when making an entry under s 39(1):[3]

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[3] Customs and Excise Regulations 1996, reg 27. Note, this regulation has since been revoked on 1 October 2018, by section 443(4) of the Customs and Excise Act 2018.

> … the person making the entry shall specify the volume of alcohol in accordance with the alcohol strength stated by the manufacturer in the invoice, or on the label of the product concerned.

[6] The Assessment Notice issued to Vienna, also stated to be an "Invoice", contained the statement "Total Payable for this Transaction $2,225,905.95".

The operation of the Customs and Excise Act 1996

[7] The Customs and Excise Act 1996 (the CEA) applied at the time of Vienna's imports. It applied in this manner:

(a) the duty on the beer constitutes, immediately upon its import, a debt due to the Crown: s 86(1) CEA;

(b) the importer is required to enter the imported goods in the prescribed form and manner, with the person making the entry required to specify the volume of alcohol in the prescribed manner: s 39(1) and (2) CEA;

(c) such entry for goods is deemed to be an assessment by the importer as to the duty payable: s 88(1) CEA;

(d) the debt to the Crown becomes due and payable when the goods have been entered in accordance with s 39 and the entry has been passed for home consumption: s 86(3)(a) CEA;

(e) the Chief Executive may amend an assessment of duty to ensure correctness: s 89(1) CEA;

(f) if such amendment has the effect of imposing a fresh liability or altering an existing liability, notice in writing is to be given by the Chief Executive to the liable person: s 89(2) CEA;

(g) the liable person may appeal the decision within 20 working days after the date of the notice of the decision: s 89(3) CEA;

(h) upon a reassessment under s 89 CEA, the due date for payment of the reassessed duty is 20 working days after the date on which the notice of amended assessment is given by the Chief Executive: s 90(1) CEA; and

(i) the obligation to pay and the right to receive and recover duty under the CEA is not suspended by any appeal or legal proceedings: s 92(1) CEA.

[8] Applying these statutory provisions to Vienna's importations:

(a) Vienna incurred a debt to the Crown in respect of each importation as it was entered by Kerry (on various dates from 23 September 2011 to 29 January 2015);

(b) each such debt became due and payable when the goods were entered;

(c) Vienna's existing liabilities were altered (increased) by reason of the Chief Executive's amendment of assessment on 5 June 2015; and

(d) that total amended liability became due and payable by Vienna on 3 July 2015.

The contractual exclusion provisions

[9] The parties' contract contained extensive provisions as to the limitation of Kerry's liability. Liability was stated to be excluded by reference to a number of defined matters, including by reference to the context in which damage or loss occurred and the nature of such damage or loss. There were also provisions placing financial caps on liability.

[10] Kerry invoked a number of clauses within the exclusion provisions. That included cl 13.2 which provided:

> 13.2 Subject to paragraph 13.1 and to any other mandatory provision of law to the contrary, [Kerry] shall not be under any liability, liable, however caused or arising, and (without limiting the generality of the foregoing)

> whether arising or resulting from through negligence, breach of contract on the part of [Kerry] or otherwise for:
>
> …
>
> (c) in connection with any instruction, advice, information or service given or provided to any person whether in respect of the goods or any other matter or thing;
>
> …

[11] It was common ground that Kerry had been engaged to provide Customs clearance services in relation to Vienna's imported products.

Defendants' summary judgment and strike out applications

[12] Rule 12.2(2) of the High Court Rules 2016 provides that:

> The court may give judgment against a plaintiff if the defendant satisfies the court that none of the causes of action in the plaintiff's statement of claim can succeed.

[13] Rule 15.1(1)(a) relevantly provides that the Court may strike out all or part of a pleading if it "discloses no reasonably arguable cause of action …".

The limitation period

The legislation

[14] Vienna's claim is for damages for breach of contract and/or negligence — that is, in terms of the Act, for "monetary relief".[4]

[15] As such, the relevant limitation provision within the Act is s 11, which provides:

> **11 Defence to money claim filed after applicable period**
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> (1) It is a defence to a money claim if the defendant proves that the date on which the claim is filed is at least 6 years after the date of the act or omission on which the claim is based (the claim's **primary period**).
>
> (2) However, subsection (3) applies to a money claim instead of subsection (1) (whether or not a defence to the claim has been raised or established under subsection (1)) if—

[4] Constituting a money claim as defined in s 12(1) Limitation Act 2010.

(a) the claimant has late knowledge of the claim, and so the claim has a late knowledge date (see section 14); and

(b) the claim is made after its primary period.

(3) It is a defence to a money claim to which this subsection applies if the defendant proves that the date on which the claim is filed at least—

(a) 3 years after the late knowledge date (the claim's **late knowledge period**); or

(b) 15 years after the date of the act or omission on which the claim is based (the claim's **longstop period**).

[16] Historically, the start date for causes of action in contract and tort have been subject to a formulation based on "the date on which the cause of action accrues".[5] The Law Commission had recommended a universal start date of "the date of the act or omission on which the claim is based".[6] The Law Commission's wording became, in the 2010 Act, the formula for money claims contained in s 11.[7] The purpose of the change in formula was to create a more clearly identifiable start date for the limitation period.

The High Court decision

[17] In the High Court, Kerry argued the claim's primary period commenced on various dates up to 29 January 2015 and the late knowledge period commenced no later than 5 June 2015. Vienna argued the primary period commenced on 3 July 2015 and accepted the late knowledge period did not assist it.

[18] The Associate Judge viewed the following submissions as reasonably arguable:

(a) the act or omission referred to in s 11 of the Act does not have to be the defendant's act or omission — the act of Customs in issuing the Assessment Notice was an act on which the claim is based;[8]

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5 Te Aka Matua o te Ture | Law Commission *Limitation Defences in Civil Cases: Update Report for the Law Commission* (NZLC MP16, 2007) at [52], referring to s 4(1) of the Limitation Act 1950.

6 At [146].

7 See [57] and [59].

8 High Court decision, above n 1, at [42]–[54].

(b) although Customs may have altered an existing liability rather than imposing a fresh liability, Vienna was not obliged to pay the increased amount until Customs issued the Assessment Notice;[9]

(c) the acts or omissions on which Vienna's claim is based include the accumulation of Kerry's errors leading to Customs' reassessment and Vienna's inability to recover the duty through the prices charged to its customers;[10] and

(d) omissions by Kerry in failing to correct its errors occurred right up until the date of the reassessment.[11]

[19] Two decisions weighed with the Associate Judge:

(a) *Galway v Pugh* — where Associate Judge Paulsen held that, if there is more than one act or omission essential to a claim for limitation purposes under s 11 of the Act, the claim is based on the last to occur;[12] and

(b) *Duthie v Roose* — a claim against an accountant for negligent tax advice, where the Supreme Court upheld findings that the settlement date on a sale and purchase agreement was the start date of the limitation period as that triggered the vendor's tax liability and until that date the plaintiff/vendor could have cancelled the transaction so as to avoid the tax liability because the vendor and the purchaser were related.[13]

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9 At [55]–[56].
10 At [57].
11 At [59].
12 *Galway v Pugh* [2021] NZHC 3431 at [31].
13 *Duthie v Roose* [2017] NZSC 152, [2018] 1 NZLR 355 at [18] and [66]–[67], affirming *Roose v Duthie* [2016] NZCA 600, (2016) 24 NZCPR 255. In the leave decision, above n 2, at [39], the Associate Judge recognised that *Duthie v Roose* was decided under the Limitation Act 1950, which "may mean [she] erred in relying on it as arguably extending the start date for limitation to the due date for the duty payable". See also the Supreme Court's commentary in *Duthie* at [43] — "liability … did not accrue prior to 2 May 2008 [the actual date of settlement]".

[20] Upon the basis of these findings as to what was reasonably arguable, the Associate Judge concluded that the answer on the Limitation Act defence (that is whether or not the defence applied under s 11 of the Act) was "not so obvious or inevitable that it [was] appropriate to either strike out the claim or grant summary judgment to the defendant".[14]

[21] Kerry argued any liability it might have had in respect of the alleged acts or omissions was excluded by the exclusion provisions in the contract. The Associate Judge found the financial cap provisions within the exclusion provisions introduced doubt as to whether paragraph 13.2 (quoted above at [10]) comprehensively excluded liability and that extrinsic evidence was required to understand the commercial context, both as to industry practice and/or to the dealings between the parties themselves — discovery and a full hearing were therefore required.[15]

Submissions

Kerry's submissions

[22] Kerry submitted that the last relevant act or omission under s 11 of the Act occurred with the last incorrect Customs entry on 29 January 2015, and, secondly (should that not be correct), the last relevant act or omission occurred no later than 5 June 2015, being the date of the Assessment Notice.

[23] Mr Cooper principally focussed his oral submissions on the second proposition that, on the facts, 5 June 2015 was the last possible date of the act or omission on which Vienna's claim is based. By focussing on 5 June 2015, when Customs issued the Assessment Notice, it is possible to side-step the two issues (above at [18(a)] and [18(b)) as to whether the "act or omission" referred to in s 11 of the Act can involve more than one act or omission and, if so, whether the date of an act or omission of someone other than the defendant may fall to be considered under s 11.

[24] Mr Cooper submitted that 5 June 2015 remains the correct date whether the relevant events are analysed by reference to the act of Customs (in issuing the

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14 High Court decision, above n 1, at [62].
15 At [84] and [90].

Assessment Notice) or the accumulation of the errors or omissions of Kerry in relation to erroneous entries and a continuing failure to correct them. On either approach, in Mr Cooper's submission, there was no relevant act or omission on which the claim could plausibly be based which occurred after the date of the Assessment Notice on 5 June 2015.

[25] Mr Cooper then addressed an argument signalled in Vienna's synopsis, that the date of 3 July 2015, identified in the Assessment Notice as the due date for payment or for any appeal from the assessment decision, was the relevant date under s 11(1) of the Act. Mr Cooper submitted the due date for payment of the debt is irrelevant for limitation purposes.

[26] Mr Cooper next referred to reasoning contained in the leave decision. The Associate Judge identified 3 July 2015 as a reasonably arguable start date for limitation based on the Supreme Court's decision in *Duthie v Roose*, referred to at [19] above.[16] The Associate Judge recorded:[17]

> [35] Although the Judgment could have been more clearly expressed, the point I was making was that it was reasonably arguable that the start date for limitation was the date that the duty payable in the Assessment Notice was due or the appeal period had expired, as Vienna had submitted based on *Duthie v Roose*. This date was not until 3 July 2015 and so it was therefore reasonably arguable the proceedings filed by Vienna on 29 June 2021 were within the six-year limitation period.

[27] Mr Cooper submitted that *Duthie v Roose* was distinguishable, having arisen at a time when the Limitation Act 1950 applied and claims in tort had to be brought within six years from the date on which the cause of action accrued — negligence was actionable on proof of damage. On the facts of that case, the plaintiff's tax liability accrued on the settlement of the sale and purchase agreement. Because the transaction was between related parties, the plaintiff could simply have cancelled the agreement, whereupon no tax liability would have arisen as no income would have been derived.[18]

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16 *Duthie v Roose*, above n 13.
17 Leave decision, above n 2 (footnotes omitted).
18 *Duthie v Roose*, above n 13, at [42] and [53].

Vienna's submissions

[28] For Vienna, Mr Murray submitted that, until the Assessment Notice was issued on 5 June 2015, Vienna had no liability obligation to pay any additional duties, having paid all deemed duties. Mr Murray submitted the Assessment Notice gave rise to the "entire basis" for Vienna's claim against Kerry.

[29] Mr Murray submitted there are two further arguments available to Vienna on the pleadings, namely that the acts or omissions on which the claim is based include the accumulation of errors by Kerry through to the reassessment and that Kerry's obligation to insert the correct alcohol strength was ongoing up until the date of the reassessment.

[30] In Mr Murray's submission, the relevant act or omission lay in the approval or (in this case) the disapproval by Customs of the details entered by Kerry, which set time running.

[31] Mr Murray submitted the primary period commenced on 3 July 2015 through the act of Customs imposing a fresh liability on Vienna for the duties due for payment on that date, and/or Vienna not making payment or appealing the decision in the Assessment Notice by that date.

Discussion

[32] Vienna can succeed on the causes of action in its statement of claim only if the claim was filed within the claim's primary period under s 11(1) of the Act. The late knowledge period under s 11(3)(a) of the Act cannot assist Vienna in this case as the claim's late knowledge date (under s 14 of the Act), namely 5 June 2015, occurred more than three years before Vienna filed its claim.

[33] Vienna's claim against Kerry arises out of the fact that, as an importer of beer, Vienna was subject to the duty regime under the CEA (as we have summarised it at [7] and [8] above).

[34] It is sufficient for the following discussion that we focus on Kerry's proposition that the last possible date of the act or omission on which Vienna's claim is based is 5 June 2015 (the date of the Assessment Notice).

[35] Under the Assessment Notice:

(a) Vienna had a debt to Customs in the sum it claims as damages from Kerry;

(b) the sum was due for payment on 3 July 2015; and

(c) any appeal would not suspend Vienna's obligation to make payment.

[36] It is unnecessary for us to decide whether the act or omission must refer to an act or omission of the defendant or can be an act or omission of someone else (the plaintiff) or the defendant. That is because, taking the view that it can be someone other than the defendant, as Vienna submitted, the latest act for the purposes of s 11(1) was 5 June 2021. That was the date of Customs Assessment Notice. Through the Assessment Notice, Vienna became indebted for the sum it now claims from Kerry.

[37] The remaining aspects of the Assessment Notice — the period for any appeal by Vienna and the date for payment of the debt — are in no sense acts or omissions on which Vienna bases its claim. Those matters do not detract from the fact that Vienna, on 5 June 2015, incurred a debt to Customs for the reassessed duty.

[38] The decision in *Duthie v Roose* does not assist Vienna on this issue. It is distinguishable for the reasons identified by Mr Cooper.[19] Foremost among those is that the (tax) liability of the plaintiff in that case did not accrue until the settlement date under the sale and purchase agreement — here, the liability of Vienna accrued immediately upon the issuing of the Assessment Notice.

[39] We accordingly find that the last possible date of the act or omission on which Vienna's claim is based was 5 June 2015. This applies to both Vienna's causes of

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19 *Duthie v Roose*, above n 13, as discussed at [27] above.

action as they both involve money claims. The claim's primary period under s 11(1) of the Act therefore expired on 5 June 2021, with the consequence that the claim (filed on 30 June 2021) was filed outside the primary period.

[40] As the late knowledge period under s 11(3)(a) of the Act had expired even earlier, Kerry has established that it has a limitation defence to Vienna's claim.

[41] Accordingly, Kerry has established that neither of Vienna's causes of action can succeed. It was and is entitled to summary judgment.

The exclusion provisions

[42] Our conclusion means that it is strictly unnecessary to decide the separate issue on which summary judgment was sought, namely that Kerry's liability was excluded by the contractual exclusion provisions. However, because it was considered in the High Court and argued on appeal, we set out in brief terms why we do not agree with the decision of the Judge on that issue.

[43] Vienna on this appeal relied on the same arguments as had found favour with the Associate Judge (above at [21]).

[44] We do not consider there is any uncertainty in the scope of the contractual exclusion provisions as they apply in this case. In particular, the liability for any damage or loss arising in connection with Kerry's provision of Customs' clearance services was comprehensively excluded by cl 13.2(c) of the contract (above at [10]). Vienna's evidence did not identify the existence or likely existence of any exchanges between the parties or any aspect of trade custom that might suggest the otherwise clear words of cl 13.2(c) were not to be given their plain meaning. Clause 13.2(c), properly construed, means on the facts of this case Kerry was not to have any liability, however caused or arising (whether from negligence or breach of contract) in connection with the provision of its Customs clearance services.

[45] Accordingly, had we not found Kerry to be entitled to judgment by reason of the limitation period, we would have found Kerry so entitled by reason of its exclusion of liability under the contract.

Result

[46] The appeal is granted. There is summary judgment for the appellant.

[47] The respondent must pay the appellant's costs of the appeal on a band A basis, together with usual disbursements. We certify for second counsel

[48] The issue of costs incurred in the High Court is remitted to that Court for determination.

Solicitors:
Wynn Williams, Christchurch for Appellant
Fortune Manning, Auckland for Respondent