IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-404-1509
[2023] NZHC 1365

UNDER	the Fair Trading Act 1986
BETWEEN	GODFREY HIRST NZ LIMITED Plaintiff
AND	BREMWORTH CARPET AND RUGS LIMITED First Defendant
	BREMWORTH LIMITED Second Defendant

Hearing:	26 April 2023
Appearances:	J C L Dixon KC, J V Barry and M C M Nash for Plaintiff J Edwards and Y Dong for Defendants
Judgment:	31 May 2023

JUDGMENT OF PETERS J

This judgment was delivered by Justice Peters on 31 May 2023 at 4.30 pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date: .....

Solicitors:	Meredith Connell, Auckland Russell McVeagh, Auckland
Counsel:	J C L Dixon KC, Auckland C L Elliott KC, Auckland

Introduction

[1] This judgment determines an application by the plaintiff ("Godfrey Hirst") to strike out four affirmative defences pleaded by the defendants ("Bremworth"). The application is made pursuant to High Court Rules 2016, r 15.1, and is opposed.

[2] When Venning J set down Godfrey Hirst's application, he also ordered that I should determine an application by Bremworth for leave to amend its statement of defence in accordance with its draft of 17 March 2023. I grant leave as the proposed amendments are neither significant nor prejudicial. I have proceeded on that amended pleading in determining this application.

Background

[3] The proceeding concerns four statements that Bremworth made in the course of its "Going Good" advertising campaign, which Bremworth commenced in about June 2020. In the campaign, Bremworth advertised its decision to cease manufacturing carpet made from synthetic fibre, and to confine itself thereafter to the manufacture of carpet made from wool.

[4] In broad terms, the statements are alleged to have:

(a) equated the environmental impact of synthetic carpet installed in the "average" home with that of 22,000 single-use plastic bags;

(b) been to the effect that synthetic carpet sheds microplastics;

(c) touted the (alleged) environmental superiority of carpet that is made from wool to carpet that is made from synthetic fibre;

(d) been to the effect that the above statements were based on "research, science and innovation".

[5] Godfrey Hirst commenced this proceeding in July 2021. It pleads four causes of action, one for each statement. Godfrey Hirst alleges that, by making each statement, Bremworth breached s 9 of the Fair Trading Act 1986 ("FTA"). To prove

such a breach at trial, Godfrey Hirst will need to establish that Bremworth is in trade, and that it engaged in conduct (that is, made the statements) which was misleading or deceptive, or which was likely to be so.

[6] Bremworth does not dispute that it is in trade and that it made the statements in issue. However, it does deny that the statements were misleading or deceptive or likely to be so.

[7] As to remedies, Godfrey Hirst seeks the same relief for each cause of action. First, it seeks a declaration of breach. Secondly, it seeks an injunction to restrain any repetition of the statement(s). Thirdly, it seeks an injunction requiring Bremworth to publish a statement acknowledging that the Court has determined that the statements were misleading or deceptive. Publication is sought on all forms of social media, and on bus shelters, billboards, newspapers, and by a release on the NZX. Alternatively, Godfrey Hirst seeks an injunction restraining Bremworth from continuing its campaign pending publication of the acknowledgement.[1]

[8] Bremworth denies that Godfrey Hirst is entitled to any relief.[2]

The affirmative defences

[9] I summarise below the four affirmative defences which Godfrey Hirst seeks to strike out, and Godfrey Hirst's response to them, as outlined in its submissions.

[10] With the possible exception of the first, none of the affirmative defences is pleaded as a defence to liability but as a ground disentitling Godfrey Hirst to any relief. The substance of the first affirmative defence is a possible exception, not on the face of the pleading but because in his submissions Mr Edwards for Bremworth said it might be relevant to the Court's determination of whether Bremworth's statements are

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1 Mr Dixon KC for Godfrey Hirst advised me that in *Carter Holt Harvey v Cottonsoft Ltd* CA83/04, 7 October 2004, the Court of Appeal stated that the Court may order corrective advertising in proceedings such as these, i.e. not initiated by the Commerce Commission. With respect to Mr Dixon, that submission does not entirely accord with my reading of the relevant authority but that will be a matter for the parties and the trial Judge.

2 See [46], [50], [54], and [58] of the draft Amended Statement of Defence of 17 March 2023.

misleading or deceptive. Bremworth will need to make this clear at the appropriate point in its statement of defence if it intends to argue this at trial.

First affirmative defence

[11] In its first affirmative defence, Bremworth alleges that between 2019 and 2021 Godfrey Hirst itself made similar statements to those it now contends are misleading or deceptive, and thus Godfrey Hirst's conduct is inequitable and it is not entitled to any of the relief sought.

[12] In respect of this first affirmative defence, Godfrey Hirst submits that its statements are or were not "similar" as alleged and, in any event, would not justify the Court declining the relief sought.

Second affirmative defence

[13] The second affirmative defence is concerned with a letter of 16 July 2021 from Godfrey Hirst's solicitors to Bremworth's, prior to Godfrey Hirst commencing proceedings.

[14] In this letter, Godfrey Hirst required Bremworth to refrain from making claims referring to the supposed benefits of carpet made from wool as opposed to carpet made from synthetic material. The letter also purported to require Bremworth to advise the public, retailers, and the NZX and FMA of the inaccuracies in its statements and of their misleading or deceptive nature.

[15] By letter dated 23 July 2021, Bremworth declined to take any of the actions Godfrey Hirst proposed.

[16] Bremworth alleges that the demands and requirements Godfrey Hirst purported to issue had the purpose, effect, or likely effect of inhibiting competition by Bremworth, and constituted conduct in breach of s 30 of the Commerce Act 1986. Bremworth alleges that Godfrey Hirst is not entitled to any relief as a result.

[17] Section 30 is the former "price fixing" provision in the Act but it has been amended to prohibit arrangements containing "cartel" provisions, as defined in s 31A of the Commerce Act.

[18] Godfrey Hirst submits that the purpose or intended effect of its letter was not as alleged but rather to require Bremworth to comply with its statutory obligations under the FTA and, again, that the allegation is no answer to liability.

Third affirmative defence

[19] Bremworth's third affirmative defence is to the effect that, by seeking the relief it does, Godfrey Hirst seeks to take advantage of its (alleged) substantial degree of market power in two distinct markets, so as to restrain Bremworth from communicating the features, characteristics, and benefits of its products. Bremworth alleges that Godfrey Hirst is not entitled to any relief as a result.

[20] Godfrey Hirst disputes that it has a substantial degree of power in either of the markets, let alone that it is seeking to prevent Bremworth from competing. Its response is that all it seeks to do is have Bremworth compete fairly. Again, it contends that the defence is, in any event, no answer to liability.

Fourth affirmative defence

[21] By its fourth affirmative defence, Bremworth alleges that, by seeking the relief that it does, Godfrey Hirst, in trade, has engaged in conduct that is "unconscionable", and in breach of s 7 FTA. Bremworth alleges that Godfrey Hirst is not entitled to any relief as a result.

[22] Section 7 FTA provides:

> **7 Unconscionable conduct**
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> (1) A person must not, in trade, engage in conduct that is unconscionable.
>
> (2) This section applies whether or not—
>
> (a) there is a system or pattern of unconscionable conduct; or

(b) a particular individual is identified as disadvantaged, or likely to be disadvantaged, by the conduct; or

(c) a contract is entered into.

(3) This section is not limited by any rule of law or equity relating to unconscionable conduct.

[23] Godfrey Hirst submits that it has not conducted itself unconscionably and, in any event, s 7 is not of retrospective effect and did not come into force until 16 August 2022, well after the letter was sent and proceedings issued.

Submissions

[24] Godfrey Hirst's application to strike out is made pursuant to rr 15.1(1)(a) and (b). Rule 15.1(1) provides:

15.1 Dismissing or staying all or part of proceeding

(1) The court may strike out all or part of a pleading if it—

(a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or

(b) is likely to cause prejudice or delay; or

(c) is frivolous or vexatious; or

(d) is otherwise an abuse of the process of the court.

Godfrey Hirst's submissions

[25] Godfrey Hirst submits that Bremworth's affirmative defences disclose no reasonably arguable defence. Even if Bremworth is able to establish the factual premise underlying each, which Godfrey Hirst denies, none of the pleaded affirmative defences is an answer to liability if a breach of s 9 FTA is established.

[26] As to delay and prejudice, Godfrey Hirst submits that the affirmative defences, if not struck out under r 15.1(1)(a), will have to be repleaded, and considerable additional discovery and evidence, including expert evidence will be required.

[27] This would mean there is no prospect of maintaining the parties' presently scheduled 10 day trial which is to commence on 11 September 2023. On Godfrey

Hirst's estimate, the additional work required, and the extension to the present trial time estimate, are such that the case would be unlikely to be heard before 2025. Godfrey Hirst submits that this would cause injustice, both to itself and to the public.

Bremworth's submissions

[28] Bremworth submits that the affirmative defences are not so "clearly untenable so as to warrant striking out".[3] It also denies the submission that there need be any delay to the trial date if the defences remain. Mr Edwards makes the point that the trial was allocated at a point in time when Godfrey Hirst was seeking an award of damages, which it is no longer, so trial time that would have been devoted to that issue is now freed up.

Discussion

[29] I accept Mr Dixon's submission that none of Bremworth's affirmative defences is a defence to liability. Liability will be established if the elements of s 9 are proved and if the case has been brought in time (see s 43A FTA), and there is no suggestion that it has not.

[30] The relevant commentary from *McGechan on Procedure* as to the purpose of an affirmative defence is as follows:

> **HR5.48.15 Affirmative defences — specific plea**
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> **(1) "Affirmative defence"**
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> The phrase "affirmative defence" is not defined in the rules. Its intent, if not its exact ambit, is widely accepted. An affirmative defence is one which relies on material outside the admission and denial of the facts alleged by a plaintiff in a statement of claim: *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZCA 154, (2012) 21 PRNZ 235 at [21]. In *Rasela v Auckland City Medical Clinics Ltd* [2021] NZHC 109 at [59], the Court adopted this definition of an affirmative defence from Black's Law Dictionary, 11th ed: "A defendant's assertion of facts and arguments which, if true, will defeat the plaintiff's or the prosecution's claims, even if all the allegations in the complaint are true."
>
> The classic example of an affirmative defence is the situation of "confession and avoidance", under which the defendant admits in whole or in part the allegation, but raises other matters claimed to exclude liability. Common examples are the defences of assumption of risk (or volenti non fit injuria)

[3] *Couch v Attorney-General* [2009] NZSC 45, [2008] 3 NZLR 725 (HC) at [33].

> (*James v Wellington CC* [1972] NZLR 978 (CA) at 982) and contributory negligence (*Brown v Heathcote CoC (No 2)* [1982] 2 NZLR 618 (HC)). Another example is failure to mitigate losses: *Stokes v Insight Legal Trustee Company Ltd* [2014] NZHC 2691 at [12], [19]; *Craike v Tilsley* [2012] NZHC 565 at [28]. The pleading of an affirmative defence now requires the opposing party to file a reply, previously it was optional — see r 5.62.
>
> **(2) Pleading**
>
> Affirmative defences, raising factual material additional to that otherwise contained in the statement of claim and statement of defence, must be pleaded specifically to avoid surprise, and to enable the plaintiff to prepare evidence in rebuttal in advance of trial: *Turnover Ltd v Buy Right Cars (2016) Ltd* [2021] NZHC 2217 at [162] ...

[31] On the basis of this commentary, an affirmative defence is one which is relied on to negative or exclude liability.

[32] On this basis, the matters that Bremworth has pleaded as affirmative defences are not in fact affirmative defences. Even if made out, they do not affect Bremworth's liability under s 9 FTA if that is otherwise established. In my view, this brings them within r 15.1(1)(a), that is they are not reasonably arguable as a defence to Godfrey Hirst's claims.[4]

[33] As Bremworth's pleading acknowledges, the relevance of the affirmative defences is as to the relief that it might be appropriate to order if liability is established. Matters such as whether Godfrey Hirst has "clean hands", and its position as a substantial competitor of Bremworth's might be relevant to the orders, if any, the Court will make when determining relief if it should come to that issue.

[34] It follows that, although I propose to grant Godfrey Hirst's application on the ground that the affirmative defences are not reasonably arguable as such, I accept that the substance of some of them may be relevant to the issue of relief if a breach of s 9 FTA is established. I say "some" because I do not consider there is any prospect that this Court will embark on the exercise of defining the "markets" that are presently alleged in the third affirmative defence.

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[4] This again is subject to Mr Edwards' submission that evidence relating to the first purported affirmative defence may assist Bremworth on its case that the statements are not misleading or deceptive.

[35] Given this, Bremworth will need to recast the affected portions of its statement of defence, and it should do so in consultation with its senior counsel and having regard to the requirements of Part 5, Subpart 10 High Court Rules 2016.

[36] For the sake of completeness, I would not have struck out the affirmative defences on the grounds of prejudice or delay. The need for additional work or trial time is not a sufficient basis for a strike out in the context of this proceeding.

[37] Lastly, I record that I am finalising this judgment having had a telephone conference with counsel last week concerning the trial. Further directions on that matter follow.

Result

[38] I grant the plaintiff's application of 17 February 2023 for strike-out of affirmative defences.

[39] In the absence of agreement on costs, the parties may file submissions but not to exceed three pages in length.

Peters J